No. 464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

WASHINGTON ALUMINUM COMPANY, INC.
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW AND JUDISDICTION

The opinions below and the jurisdictional requisites are adequately set forth in the Brief for the Petitioner.

QUESTIONS PRESENTED

1. Whether a spontaneous, unilateral walkout because of (not in protest of) cold conditions, in the complete absence of a current labor dispute or a purpose to bargain collectively over pre-existing conditions, constituted "other concerted activities for the purpose of collective bargaining or other mutual aid or protection", within the meaning of Section 7 of the National Labor Relations Act.

2. Whether the National Labor Relations Board may order reinstatement of discharged employees who had

engaged in an "economic strike" in the absence of findings of fact showing the existence of a current labor dispute, within the meaning of Sections 2(3) and 2(9) of the National Labor Relations Act.

3. Whether the Respondent lawfully discharged "for cause", within the meaning of Section 10(c) of the National Labor Relations Act, certain employees who violated plant rules by leaving their jobs without permission and without informing their foreman of their intentions.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, the Labor Management Relations Act and other statutes not set forth in the Brief for the Petitioner are set forth in Appendix A, *infra*.

STATEMENT

The Brief for the Petitioner, as in the case of the Trial Examiner's Intermediate Report (R. 8) and the Board's Decision (R. 2), makes inadequate reference to Respondent's evidence which proves that the cold condition of the plant on the morning of January 5 did not represent normal working conditions or a continuation of pre-existing working conditions which were the subject of a pending grievance or labor dispute. All three said writings disregard without reason Respondent's evidence which points only to the conclusion that the walkout occurred in response to a jocular statement made by Respondent's foreman and *because* the plant was cold as the result of momentary misfiring of a furnace, not as an economic strike in protest against pre-existing cold working conditions. This case presents an illustration of the Board's breach of the unequivocal mandate of Congress that the Board must "not infer facts that are not supported by evidence of that

are not consistent with evidence in the record", that it must "not concentrate on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings", and that it must not indulge in "the substitution of expertness for evidence in making decisions".[1] The Board's use of a simple syllogism is apparent: there was a strike; the strike was in response to working conditions and hence was an economic strike; the Act protects economic strikers from discharge. The fallacy of this syllogism, as often is the case, stems from its bare simplicity. Accordingly, the facts require more extensive treatment than that given by the Board's counsel.

There Was No Current Labor Dispute Over Cold Working Conditions

The Respondent is engaged in the fabrication of aluminum products in a plant located at Baltimore, Maryland. In January, 1959, only nine of its employees were assigned to its relatively small machine shop — a foreman (Jarvis), the seven men who are involved in this case, and one other machinist (Tafelmaier). Respondent's machine shop area, being a part of B shop and measuring approximately forty by seventy-five feet, was heated by two gas-fired space heaters of 85,000 B.T.U. output.[2] Its primary supply of heat, however, came from an oil-fired furnace with a capacity of 1,500,000 B.T.U. situated in A shop which was separated from B shop by a partition. The heat from this main furnace flowed generally and by means

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[1] H. Conf. Rep. No. 510, 80th Cong. 1st Sess., p. 56.

[2] The B.T.U. was explained in technical terms in the testimony (R. 99)

of directional ducts into the machine shop area through two doorways ten feet wide and eight or nine feet high and through the two top rows of windows of the partition, the window lights of which had been knocked out (R. 49-50, 64, 95, 98).[3] In addition, the Respondent attempted to provide warmer working conditions in late November, 1958 (less than two months prior to the January 5 walkout), when it installed an additional 500,000 B.T.U. furnace in A shop (R. 64), the heat from which also flowed into the machine shop through the open windows and doors above mentioned.

The Trial Examiner's Intermediate Report failed to advert either to the plant's heating system or to any pre-existing cold working conditions. The Board, however, realizing the significance of these omissions, attempted to equate the unusual, non-recurring cold condition of the plant on one of the coldest mornings of the winter with pre-existing working conditions by pointing to "the credited testimony of employees Heinlein, Caron and George as to previous complaints made to Respondent's foremen over the cold working conditions" (R. 3). A review of this testimony, however, shows it to be so vague, unspecific and so completely unrelated to the condition on the morning of January 5 as to be entitled to no weight or materiality whatsoever. It manifestly was no more than the universal resort to the state of the weather as a topic of conversation.

The evidence of the installation of the 500,000 B.T.U. furnace in A shop within less than two months of the January 5 walkout destroys whatever vague value the Heinlein testimony had deserving of consideration by the

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[3] A floor plan showing both the location and capacity of all heating units, was introduced in evidence as General Counsel's Exhibit No. 3.

Board.[4] The testimony of George[5] and Caron[6] was similarly vague and unspecific. The most that the testimony of these men proved is that three men, individually, not in concert, may have "remarked", "asked" or "talked" about the cold to their foreman or an estimator or a production coordinator on some vague occasion or another.[7] The remaining four of the seven machinists involved in the walkout did

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[4] Heinlein testified he frequently "*remarked*" to Rushton, Esender and, he "*thought*", to Campbell about the cold; but he could remember no specific date or time (R. 32). When cross-examined as to the specific days he spoke to Rushton, he said "Well, I couldn't say what day. It may have been two or three times during the six months before that. Maybe a year before that. Maybe two years." (R. 33-34). Thus, Heinlein's testimony cannot possibly support a finding of a *current* dispute. The Board is in error in finding that Heinlein complained to Respondent's foremen (R. 3). In the winter of 1958-59, Esender and Campbell were not even supervisors of Heinlein. Esender was a production coordinator; Campbell was in the estimating department in an entirely different building (R. 60). Wampler was general foreman over Jarvis and the men (R. 60); Tarrant was plant manager (R. 59); Rushton was President. Rushton had been out of the shop for 2½ or 3 years; although prior to that he had had some gripes (R. 64).

[5] "Q. (By Mr. Wescott) Who did you complain to? A. Mr. Esender and Mr. Jarvis. Q. Can you recall any specific time that you complained to Mr. Jarvis? A. On several of the cold mornings I *asked* Mr. Jarvis [the foreman] why the large furnace wouldn't put out more heat" (R. 35).

[6] "Q. Did you ever make any complaints to anybody concerning that? A. I used to *talk* to Dave [the foreman] that it was cold and miserable. * * * Q. (Trial Examiner) On what day was this, now? A. (The Witness) Not any special day. On cold days." Caron went on to testify that he never complained to any other company official and that the only *specific* day he could think of that he complained to the foreman was, he "*thought*" as to a cold spell two weeks prior to January 5 (R. 26-27). *This testimony was not corroborated by any of the other men.*

[7] A reading of the transcript will show that while the Board's counsel used the words "complain" or "complaint", the witnesses respective responses characterized prior mention of cold conditions by the words "remarked", "asked" and "used to talk". Only Caron, after being led by Board's counsel, testified that "we were all complaining then" as to a cold spell two weeks prior to January 5 (R. 26, 89). This uncorroborated testimony was of course hearsay as to any one but himself.

not even testify as to any previous "complaints."[8] There is no evidence whatsoever that any previous "complaints" were made *as the result of concerted activity* on the part of the men. The men never asked Jarvis to go to someone higher up in the management (R. 51). The foreman and higher management were totally unaware of any specific request that action be taken or of any demand that more heat be brought into the plant.

The "complaints" to Jarvis, the foreman, were nothing more than "general griping". "It is either too cold or too hot * * *. I always accepted these things as the sort of griping that is done in a shop" (R. 50-51). Tarrant, Wampler and Rushton corroborated Jarvis and were unanimous in their testimony that the general gripes about the cold were in the course of normal conversation and the same sort of gripes as the gripes made about the heat in the summertime (R. 59, 60, 64-65).

The record in this case is devoid of any evidence whatsoever of a pending grievance about cold working conditions or of a pending demand or request, general or specific, made by the men, individually or in concert, that more heat be supplied to the machine shop area. As the Court of Appeals pointed out, the men had not even made a simple request of the plant maintenance man that he turn up the thermostats on any or all of the various heaters and furnaces (R. 120).

The Board made no specific finding that a current labor dispute existed, apparently under the assumption that Sections 2(3) and 10(c) did not require such a finding. Clearly this assumption allowed the Board to reach its

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[8] The eighth machinist, Tafelmaier, was asked by the Board's counsel: "Q. (By Mr. Wescott) Did you ever complain to Mr. Jarvis about the heat in the plant? A. No" (R. 47).

conclusion with less difficulty; for to dignify the testimony above mentioned as evidence of a current labor dispute within the meaning of Sections 2(3) and 2(9) is patently absurd.

The Cold Conditions on January 5 Were Fortuitous, Momentary and Completely Unrelated to Pre-existing Working Conditions

There is no question that at the time of the walkout, working conditions in the plant were less than comfortable by reason of a cold wave, accentuated by the watchman's inability to start the main furnace which heated the plant. However, these conditions were in no sense of the word *normal* working conditions, but were completely fortuitous, and were corrected by Respondent on its own initiative as soon as possible.

The morning of January 5 was one of the coldest experienced in the Baltimore area during the winter of 1958-59 (R. 47). The temperature at 8:00 A.M. was 15°. The high for the day was only 22°; the low reached 11°; and the day's resultant average temperature was only 17°, representing minus 18° deviation from normal (R. 87). The freezing temperatures were accompanied by northwest winds averaging 24.4 m.p.h. with gusts up to 49 m.p.h. (R. 87), the highest wind velocities recorded for the entire month (R. 110; G. C. Ex. 2). Six of the seven men honestly admitted that the plant was much colder than on other Monday mornings of that winter (R. 34, 36, 39, 40, 42, 43). Only the shop leader, Caron, the Board's most important witness, refused to admit this obvious fact (R. 30). He said, "I don't remember".

Respondent's witnesses also made it unequivocally clear that the cold condition in the plant had no relation to pre-

existing or normal working conditions. Jarvis explained it saying that when he arrived that morning the main furnace was not functioning (R. 51). Tafelmaier, the eighth machinist (the only one who did not join the walkout), wore his overcoat at his machine from 7:30 until 10:30 A.M., at which time he took it off, comfortable working temperatures having been restored. This was the only morning of the entire winter that he wore an overcoat (R. 46-47). The Trial Examiner himself found (R. 14) "There can be no doubt whatever on the record herein that on January 5, the Respondent's plant was somewhat colder than usual."

Respondent was fully aware of its responsibility to combat cold conditions. The night watchman had standing instructions to turn on all furnaces and heaters at such regular intervals as may have been necessary to maintain suitable temperatures throughout the plant on cold nights and weekends (R. 48, 61). And at 10:00 P.M. on the very cold Sunday evening before the walkout, the company president himself had visited the plant to make sure that adequate heat would be provided the employees the following morning (R. 65).

On the Monday morning in question, the watchman, pursuant to orders, had actually turned on the space heaters and the 500,000 B.T.U. furnace at 1:00 A.M., (for one and one-half hours) and again at 5:00 A.M.; ironically however, he was unable to start the 1,500,000 B.T.U. main furnace at either time (R. 48). He notified the company electrician of the difficulty at or about 7:15 A.M., as soon as the electrician arrived at the plant. The electrician immediately diagnosed the trouble as a simple matter of manipulating a control switch at the rear of the furnace, and the furnace was put into operation within a minute or two

after the starting bell rang at 7:30 A.M. (R. 63). By 7:45 A.M., the main furnace was burning at full capacity. By 10:00 or 11:00 A.M., the plant was warm (R. 46, 56, 64). By lunchtime, the plant was heated to normal working temperatures and the men were working, as they did ordinarily, in their denim shop coats (R. 56-57, 96-97).

In the face of this evidence, the Trial Examiner (R. 17) and the Board (R. 3) concluded that the walkout at 7:35 or 7:40 that morning, was in protest of "working conditions." They did not and could not find, however, that these "working conditions" were a continuation of pre-existing working conditions or that Respondent had any other intention than to correct them immediately.

The Walkout Was Not Intended As A Protest But Was Rather A Temporizing Response To the Cold and to the Foreman's Statement Made to Caron.

On the morning of January 5, David Jarvis, the foreman of machine shop, arrived at the plant sometime after 7:10 A.M. Finding the plant unusually cold, he discovered that the main furnace in A shop was not functioning and searched out the watchman. He and the watchman then contacted the company electrician as soon as he came in and immediately put him to work on the furnace (R. 51). Jarvis then went to his office in the machine shop. At about 7:20 A.M., Caron, the leader in the machine shop, came in and they talked about how cold it was (R. 27). Some men walked by outside the office and Jarvis, in a facetious way, said to Caron, "If those fellows had any guts at all, they would go home" (R. 27), or perhaps he said, "If we had any guts, we'd go home." He does not remember whether it was "we or they", whether it was "personal or plural" (R. 52). In any event, he gave the statement no significance at the time, having frequently talked with Caron in a

jocular way." Jarvis then left his office to take a finished part to the shipping department with shipping papers (R. 53).

At about this time, the other employees of the machine shop began reporting for work. The buzzer sounded and the men were standing around, cold, and Caron said to them, "Well, Dave told me if we had any guts, we would go home." Caron continued, "I am going home, it is too damned cold to work" (R. 28). Caron then said to the men, "What are you fellows going to do?" and they told him they "were going home also *because* it was too cold to work" (R. 90). Caron then walked out (R. 28), but he did not punch out his time card (Resp. Ex. 1). The six other machinists followed Caron out, punching their time cards upon leaving the plant at the following times: 7.6M, 7.6M, 7.6M, 7.7M, 7.7M and 7.7M (Resp. Ex. 2). The numerals after the decimal points represent tenths of an hour or six minutes for each tenth. Thus, it is clear that the men walked out less than twelve minutes after the 7:30 A.M. starting buzzer had sounded.

Jarvis returned from the shipping department to his office by going across the center of A shop through the

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"(The Witness) * * * But I have to qualify this in the sense that it was partly Mr. Caron and my relationship. I don't know how to suitably put that into words.

"Q. (By Mr. Bair) Well, do the best you can? A. Well, we — I tried to be most frank with Mr. Caron on everything that we did. I tried to have here a man that if need be could replace me in the shop, or was fully aware of what was going on. We also worked together, as I said before; and, therefore, I was under the impression that things of this nature that we had said and had been said prior to this at various times, such as if we had a bad job, why, I think — I think one specific job, I remember we had a landing gear we were working on. Something went wrong with it. And remarks were made to the sense that 'grab your tool box and let's go, this job is all fouled up.' Something of that nature. This was more or less our relationship. I don't know how I can dress that up anymore, or make it any clearer" (R. 52).

center door on the west side of A shop, then down towards the machine shop area to his office (Tr. 142). He got back to his office a few minutes past 7:30 A.M. From the door of his office, he saw the men walking across A shop towards the time clock on the other side of A shop (R. 53-54, 97). William George hollered to him, "We are going home. Do you want to come with us?" (R. 53). Jarvis was "flabbergasted" (R. 58); he thought the men were kidding (R. 53); his first thought was that it was "a put-up joke or something of that nature" (R. 58).[10] Just then, Tafelmaier came walking by, hesitant and looking puzzled. When Jarvis asked him where he was going, Tafelmaier replied that he guessed he would go too. Jarvis said, "Well, now, just hold on a minute." As he talked to Tafelmaier, the other men went out the door (R. 94). Jarvis told Tafelmaier that walking out "wasn't the thing to do" and that if he had another coat he should get it and put it on. Tafelmaier stayed and subsequently Jarvis put him to work (R. 53).

Jarvis then reported the walkout to Wampler, the general foreman, and to Rushton, the President, as soon as they arrived that morning (R. 54). Wampler realized that the company had critical jobs in the machine shop and took steps to supply Jarvis with two other men to carry on these jobs (R. 54, 61). Notwithstanding this, the machine shop operation was seriously curtailed (R. 56, 61).

[10] Caron testified he met Jarvis near the time clock on the way out and told Jarvis that it was too cold and that he was going home (R. 28). Jarvis denied this (R. 96), saying that the only man who hollered to him as the men were walking out was Bill George (R. 53-54). Heinlein and Adams also testified they talked to Jarvis on the way out (R. 33, 96) which Jarvis denied (R. 54, 96). The conflict in the evidence is unimportant. The seven men did not contend, but rather denied, that they had Jarvis' permission to leave (R. 32, 34, 37, 39, 40, 43, 44, 89). Moreover, Jarvis' permission would not have availed. To allow the seven men to go home, and thus close down the machine shop, Jarvis would first have had to consult Wampler, the general foreman, or Tarrant, the plant manager (R. 95).

The basic reason for the walkout testified to by all seven men was that it was in response to the invitation or dare contained in Jarvis' jocular or facetious statement made to Caron and relayed by Caron to the men to the effect that if they had any guts they would go home (R. 27-28, 30, 33, 37, 38, 40, 42, 45). The men also testified that the second reason they went home was that it was too cold to work that morning.[11] But an objective appraisal of all the evidence makes it plain that without the encouragement or the "dare" extended to the men by Caron in the form of Jarvis' statement, the men would never have walked out of the plant that morning simply because it was cold. The operations of a fabricating plant do not and can not stop in cold weather. It was frequently necessary from the nature of the business to open the doors to the outside to bring in raw materials and to take out finished products (R. 50).

That Jarvis' statement was basically responsible for the walkout can best be established by referring to testimony

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[11] The Trial Examiner and the Board (R. 3, 14) and the Board's Brief (page 20) place emphasis upon the so-called "credited testimony" of Hovis, which was admitted in evidence over Respondent's motion that it be stricken and which reads as follows (R. 43-44):

> "Q. (By Mr. Bair) Now, why did you leave the plant on Monday morning with these other men? A. Well, they said it was extremely cold. And we had all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way."

The answer of Hovis was not only completely unresponsive to the question, but it represented self-serving hearsay testimony, involving not only subjective thinking of the witness but the subjective thinking of others. It is hearsay, guess and speculation of the witness as to the state of mind of others. Moreover, the testimony is so completely discredited by other testimony of Hovis given previously before the Maryland Department of Employment Security, as to be not worthy of belief. This testimony is discussed below. (Compare the Trial Examiner's ruling on this point with his ruling when counsel for Respondent asked Caron if he "thought" Jarvis was serious in making the "had-any-guts" remark (R. 90). Compare also the Trial Examiner's ruling on Rushton's testimony as to the discussion which took place prior to the disciplinary action (R. 66).)

given by three of the seven men in a prior unrelated proceeding, at a time when the men were unaware of the importance which their testimony would have on their rights under Section 7 of the National Labor Relations Act. On February 24, 1959, Affayroux and Hovis testified before the Maryland Department of Employment Security and, on April 6, 1959, Olshinsky testified before the same Department. The three men were seeking to recover unemployment compensation after the Company had objected to their claims on grounds that the men had been discharged for cause as a disciplinary measure. At the hearings before the Maryland Department of Employment Security, Affayroux testified that "The leader of the machine shop stated that the foreman had said that it was too cold to work and we would be fools if we did not go home" and that "*as a result of this statement* by the leader [I] left the job along with the other men" (R. 42-43).

Olshinsky at first denied that he testified before the Maryland Department of Employment Security to the effect "that the leader of the machine shop told the employees that they could go home because it was too cold to work in the shop" (R. 40), but he later went on to admit that he testified before the Maryland Department that he was of the opinion that if the foreman wasn't there, the leader had authority to permit him to go home (R. 40). After some discussion at the hearing before the Trial Examiner, it was eventually stipulated between the parties "that Frank Olshinsky appeared before an Appeals Referee of the Maryland Department of Employment Security on April 6, 1959 and testified that it was customary to take orders from the leader, and that he was of the opinion that the leader had the authority to permit them to go home" (R. 41).

Similarly, Hovis testified before the Maryland Department of Employment Security that the leader of the machine shop had told him that it was too cold to work and that the men were going home, that he had never questioned Caron's authority before and that he assumed that the leader was speaking for the foreman (R. 44-45).[12] Compare this testimony with his testimony set forth in footnote 11, *supra*.

Parenthetically, it should be noted that if the men had walked out under the mistaken impression that they had the foreman's permission, the walkout would not have been for the purpose of "mutual aid or protection." *Scott Lumber Co., Inc.*, 109 NLRB 1373, 1375 (1954).

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[12] Hovis' attempt to reconcile his testimony before the Maryland Board with the testimony he wanted to give before the Trial Examiner is very revealing (R. 44-45):

"Q. Did you think that you had permission to leave? A. No.

"Q. Did you think that you — that the leader, Caron, could give you permission to leave that morning? A. No.

* * * * * *

"Q. Did you testify before the Maryland Department of Employment Security on February 24, 1959? A. Yes.

* * * * * *

"Q. Now, at that hearing before the Department of Employment Security, did you or did you not testify that the leader of the machine shop told you that it was too cold to work and that you were going home? A. That is right.

"Q. Did you or did you not testify that you had never questioned the authority of the leader before? A. No, I never had. I still didn't think I had permission.

"(Mr. Bair) That is not responsive.

"Q. (By Mr. Bair) Did you testify that you had never questioned Caron's authority before? A. No, I never questioned his authority.

* * * * * *

"Q. Now, did you or did you not testify that you assumed that the leader was speaking for the foreman? A. Yes. I thought he was speaking for the foreman.

"Q. You did? A. Yes.

"Q. So when Caron said that Jarvis said it was too cold, if you had any guts you should go home, you thought Caron was speaking for Jarvis; right? A. Right."

The subsequent actions of the men also strongly tend to show that the walkout was a temporizing response to the cold and to the Jarvis statement and not a "strike" in protest of working conditions. The evidence clearly shows that the men did not walk out to enforce compliance with a demand or request, refusing to return unless Respondent granted some concession. It shows rather that they intended to return to their jobs the next morning in any event.

In fact, George did return to work Tuesday morning, January 6,[13] not knowing he had been discharged (R. 36). Caron testified that as he was leaving, he said to Jarvis, "*I will see you tomorrow*, I am going home", receiving the reply, "Okay, Babe, I will see you tomorrow" (R. 90). Heinlein testified that "certainly" he was going to return to work the next day (R. 34). Affayroux did not even go home. He went to a nearby diner for some coffee and returned to the plant later that morning (R. 43). Adams said he went home because he was running a fever and was sick. He later obtained a doctor's certificate to substantiate the fact (R. 38). He also stated that he, too, intended to return to work the next day (R. 93).

Far from being protestants to a labor dispute, the men evidenced feelings of remorse in walking out. Affayroux, upon returning to the plant the same morning, told Tarrant he had gone to a diner for coffee because he was cold and wasn't feeling well and asked to go back to work (R. 98). He also asked Jarvis (R. 57). George told both Jarvis and Tarrant that he realized he made a serious mistake and knew he was wrong. He also wanted to be taken back (R. 56, 98). Adams told Rushton he was sorry and that he wanted to return to work (R. 57, 100).

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[13] January 6 was almost as cold and almost as windy as January 5 (See G. C. Ex. 2).

The Reasons for or Motives Behind the Discharges Were Proper, Lawful Ones, Completely Divorced from Anything Condemned by the National Labor Relations Act.

Jarvis, Wampler and Rushton discussed at length the unauthorized walkout. It was decided that the walkout could not be tolerated (R. 59, 66). The men knew that they needed the permission of their foreman to leave the plant (R. 31-32, 34, 39, 43). Yet, in violation of this plant rule (R. 66-67), a rule vitally necessary to the maintenance of plant discipline (R. 66), they walked out, not only without the permission of their foreman, but even more significantly, without asking his permission, without informing him of the action they were taking and, indeed, without discussing the matter with him in any way (R. 31, 34, 37, 39, 40, 42, 44). Not one of the men had made inquiry as to the cause of the cold condition of the plant or as to what the Company was going to do about it (R. 54). Six of the seven men had not inquired or investigated whether the main furnace in A shop was properly functioning (R. 31, 34, 36, 38, 39-40, 43). Apparently Affayroux was the only one who knew that the main furnace was not operating (R. 42). And, none of the men, not even Affayroux, talked with anyone in management, to find out what the difficulty was or what steps were being taken to correct the difficulty (R. 31, 34, 38, 39-40, 42, 43, 54, 92).

For these reasons, for walking out without asking their foreman's permission and without informing him of the action they were taking,[14] the men were discharged (R. 55,

[14] The Trial Examiner refers to the second reason as "an afterthought" (R. 16). There is no basis whatever in the record of this case for reaching any such conclusion and such conclusion is clearly erroneous. A reading of the testimony of Fred N. Rushton (R. 65-67; Tr. 212-218) makes it quite clear that Rushton was extremely upset because of the fact that the men walked off without even giving Jarvis an opportunity to discuss the matter with them.

59, 62, 65-66). The decision was made between 9:00 and 9:30 A.M. Jarvis was able to inform three of the men personally or by telephone and he sent telegrams to the other four (R. 15, 55).

Summary of Facts

As pointed out by the Court of Appeals (R. 116), "* * * the record here before us manifests a conspicuous and total absence of any action on the part of the employees to attempt to make inquiry concerning the causes of their physical discomfort or to present their claims or demands to the company prior to the walkout." The record also shows that while the men walked out *because* it was cold, the walkout was neither a strike nor a work stoppage *in protest* of working conditions. It was precipitated by a statement of a foreman which was intended as facetious. It was engaged in by all completely without reference to a current labor dispute or a pending demand or grievance and without expressed purpose or stated objective. Management was neither consulted nor informed as to the intended action or the purpose of the walkout and had no opportunity whatsoever by negotiation or concession to avoid the walkout and thus maintain its important machine shop operation. Under the circumstances, the Company refused to condone the unilateral, precipitous action at the price of abandoning necessary plant discipline, and decided to discharge the men. It cannot be disputed that the only reason for discharging the men was to punish them for violating plant rules in leaving their jobs without permission and without informing their foreman of their intentions and that the only motive was the desire to maintain plant discipline.

The Complaint, the Intermediate Report and the Board's Decision and Order

The Complaint in 5-CA-1498 charges the Respondent with interfering with, restraining and coercing its employees in the exercise of rights guaranteed by Section 7, in violation of Section 8(a)(1) of the Act and with discouraging membership in a labor organization by discrimination in regard to hire and tenure of employment, in violation of Section 8(a)(3) of the Act (R. 9). The Trial Examiner (R. 19) and the Board (R. 3) found only a violation of Section 8(a)(1), the Trial Examiner reporting: "No labor organization is alleged to be, nor was any proved to be, involved in Case No. 5-CA-1498" (R. 12). Notwithstanding this, and without a scintilla of evidence to support a "discriminatory"[15] discharge or a finding of a motive to discourage concerted activities, paragraph 1(a) of the Board's Order (R. 4) would require the Respondent to cease and desist from "discouraging concerted activities of its employees by discriminatorily discharging any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment", using the language of Section 8(a)(3). No matter what the outcome of this litigation this part of the Board's Order is totally unwarranted and should be stricken.[16]

In finding a Section 8(a)(1) violation, the Board's cursory decision relied, "*inter alia*," upon the following (R. 3):

> "the credited testimony of employee Hovis that 'We all got together and though it would be a good idea to

[15] All men involved in the walkout were discharged, indiscriminately and without exception.

[16] Where there is only "one item" of unfair practice, "there appears no reason for enlarging the scope of the enforcement decree beyond that feature." *National Labor Relations Board v. Crompton — Highland Mills, Inc.*, 337 U.S. 217, 226 (1949)

> go home; maybe we could get some heat brought into the plant that way;' the credited testimony of employees Heinlein, Caron and George as to previous complaints made to the Respondent's foremen over the cold working conditions, and to the effect that the men left on the morning of January 5 in protest of the coldness at the plant; and the evidence that the 7 complainants left the shop approximately the same time."

The Board ordered reinstatement of the discharged employees, with back pay, finding that such action "will effectuate the policies of the Act" (R. 4). The Board, however, did not make a finding that the men were employees whose work had ceased in connection with a current labor dispute within the meaning of Sections 2(3) and 2(9); nor do the facts found by the Board or the Trial Examiner support an ultimate finding of a current labor dispute.[17]

Neither the Trial Examiner nor the Board made proper findings upon or gave "adequate explanation of its reasons for disregarding or discrediting" the evidence of the Respondent which proved that the discharges were made for cause for reasons and motives which are in no way condemned by the Act. Respondent is entitled to such findings or explanations under Section 10(c), which deprives the Board of power to reinstate employees who are "discharged for cause".

The Decision of the Court of Appeals

The Court below properly denied enforcement of the Board's Order. It held that a summary, unilateral walkout "without any sort of demand on the company" was

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[17] Compare *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 344, 349 (1938).

contrary to the policy of the Act and to "the fundamental purposes of collective bargaining" and hence was not an activity protected by Section 7 (R. 121-23). It implicitly recognized, by requiring "a demand or request made to the employer", that discharged economic strikers are not entitled to reinstatement unless there is a current labor dispute (R. 118). It takes two to make a fight, and the employer could not be a party to a "dispute", which it did not know existed. The employer, as much as the employees, regretted the cold condition, and had already acted to remedy it. Hence there was nothing to dispute about. The Court concluded that "the discharges were not, in any sense, discriminatory, and were not without justification" (R. 122-23).

SUMMARY OF ARGUMENT

1. Section 7 does not protect, as a concerted activity for mutual aid or protection, a walkout which is not a protest against either working conditions or an employer unfair labor practice. In this case, the facts show that the walkout occurred not as a protest against working conditions as customarily maintained by the employer, but because of the momentary exceptional, cold due to an unforeseeable misfiring of a furnace and because of the foreman's statement relayed to the men by the leader. The facts do *not* show that the purpose of the walkout was either for "aid" in bargaining over a labor dispute or for "protection" from an employer unfair labor practice. The pretense that a current labor dispute existed probably resulted from the Board's belief that the punishment of discharge was disproportionate to the offense, a matter over which the Board has no jurisdiction. The Board's finding that the walkout constituted an "economic strike" is not supported by substantial evidence on the record considered as a whole.

2. Under Section 10(c) of the Act, only "employees" may be reinstated. By reason of Section 2, an employee who engages in a strike over working conditions (an economic strike) remains an "employee" but only if he ceased work "as a consequence of, or in connection with, a current labor dispute." The Board made no finding that the walkout occurred in the course of a current labor dispute, as indeed it could not, for there is no evidence whatever in the record to support such a finding. Consequently, once the men were discharged by the Company, Section 2 did not operate to preserve their status as "employees", and the Board was without power to reinstate them.

3. Under Section 10(c) of the Act, reinstatement may be ordered only if the employer commits an unfair labor practice and if reinstatement "will effectuate the policies of the Act." Reinstatement may not be ordered in the case of a discharge "for cause". Even if this Court concludes that the employees engaged in an economic strike, Section 7 does not automatically protect them from discharge.

a. The right to strike is not absolute. The right as it existed prior to the passage of the National Labor Relations Act, was neither modified nor enlarged by the Act except only in the narrow sense that the Act imposed a duty upon employers not to interfere with strikers where such interference was motivated by a desire to deprive the employees of their right under Section 7 to organize and to bargain collectively. If an employer interferes with an economic strike by way of discharge of strikers for any other motive or reason, this does not constitute an unfair labor practice, and the provision in Section 10(c) authorizing reinstatement cannot be applied.

b. Under Section 10(c) of the Act, the Board is without power to reinstate employees discharged "for cause", even

though the cause coincides with or is connected with concerted activity otherwise protected by Section 7. Here the discharges were made to punish insubordination and infraction of rules in the interest of maintaining order and discipline, reasons and motives which are not condemned either by the letter or the spirit of the Act. If the men had been discharged to make room for others to carry on the machine shop operation in the way desired by the employer and not the way being dictated by the men, such discharge for such reasons would also have been lawful and proper. Employees who engage in an economic strike are subject to the same economic risk, that of discharge, to which they were subject before the passage of the Act, so long as the employer's motives and reasons in discharging them are *bona fide* and lawful ones.

c. The rights of employees protected by Section 7 do not expressly include the right to strike, although obviously Congress could specifically and expressly have afforded such protection. Even if Congress, without saying so, meant to protect economic strikes by Section 7, the language of the statute is such that only economic strikes which are consistent with and part and parcel of the processes, practices and procedures of self-organization and collective bargaining can possibly be protected by its provisions. Reinstatement of striking employees under Section 10(c) *will not* "effectuate the policies of the Act" where the necessary effect of such reinstatement will be to encourage unannounced walkouts without stated purposes or objectives and thereby sanction and promote all manner of industrial strife and unrest which will surely follow all such walkouts. Reinstatement of such strikers will only undermine these policies. On the other hand, where the failure to reinstate employees will do nothing more than vindicate an employer's desire to maintain discipline and

order in the operation of its business, such a result will in no way conflict with or undermine the policies of the Act.

ARGUMENT

A.

There Is No Basis in the Record for a Finding that a Current Labor Dispute Existed, and the Board Was Without Jurisdiction to Substitute Its Judgment on the Question of Appropriate Disciplinary Measures for that of Management.

The facts show beyond peradventure of a doubt that the walk-out did not occur in the course of a current labor dispute. In this respect, this case is similiar to *National Labor Relations Board v. Sunset Minerals, Inc.*, 211 F. 2d 224 (9th Cir. 1954) and *Scott Lumber Co., Inc.*, 109 NLRB 1373, 1375 (1954).

The patent absence of any current labor dispute on that cold morning in January, 1959, when mechanical failure delayed operation of the furnace, has led Petitioner to the extreme of pretending the existence of one on the grounds of isolated, stale individual complaints about the temperature in Respondent's factory. Such scattered complaints as there were had related to the heat level under normal operating conditions, not to cold resulting from equipment failure. There was no evidence that such a failure had ever occurred before. The supposed labor dispute consisted, therefore, of nothing more than the general discontent, manifested wherever any sizeable group of humans congregate, over temperatures. To maintain a heat level uniformly satisfactory to every occupant of a space is evidently impossible. It would be no exaggeration, therefore, to say that, on the reasoning of Petitioner, in virtually every plant throughout the United States at all times a "labor dispute" on this issue is "current".

If Petitioner's position is to be considered at all, it must go so far as to say that grounds existed on January 5, 1959, which, by reason of Section 7, would have precluded discharge of the seven employees, even though the furnace had functioned properly and they had walked off the job without notice to or permission from the employer, albeit Respondent's shop had been heated to the normal temperature — a temperature sufficient to enable the men customarily to work without coats, in denim jackets. This is inescapably so because the supposed proof of a current labor dispute related exclusively to times of normal operating temperatures.

Consequently, Petitioner's position comes down to this: Whenever a concerted work stoppage occurs, with no warning to the employer, and regardless of the resulting disruption to production, so long as the reason assigned is unsatisfactory temperatures, the employer will be barred from disciplining the participants. Since proof of dissatisfaction with heat levels as strong as that in the present case can be produced for virtually every place of employment, the consequence will be a sure-fire protection from discharge for the participants in any work stoppage whatever. Such a weapon in the hand of one of the parties is not calculated to promote healthy industrial relations nor to further the aims of the National Labor Relations Act.

In reviewing the decision of the Board, it is difficult to escape the conclusion that a belief that the punishment of discharge was disproportionate to the offense led the Board to pretend the existence of a current labor dispute, when none existed. Only by doing so could it gain jurisdiction to reverse the employer's action. But Congress has never concluded that the Board should be given authority to impose its judgment as to what is appropriate discipline on the employer. Without in any way wishing to awaken

echoes of economic royalism, we respectfully suggest that it is dubious indeed that the Board's judgment in such matters will equal or be superior to that of the management, which not only has more complete knowledge of the multiple factors involved in any disciplining decision, but also has a direct responsibility, not capable of being felt by the Board, for the success of the enterprise. The point is well stated in *National Labor Relations Board v. Montgomery Ward & Co., Inc.*, 157 F. 2d 486, 490 (8th Cir. 1946), as follows:

> "In considering the propriety of these discharges, the question is not whether they were merited or unmerited, just or unjust, nor whether as disciplinary measures they were mild or drastic. These are matters to be determined by the management, the jurisdiction of the Board being limited to whether or not the discharges were for union activities or affiliations of the employees."

In all events, Congress has granted no such jurisdiction, and this Court should not aid the Board in its efforts to seize such jurisdiction in the guise of a fictitious finding of an economic strike or a current labor dispute under the existing statutory language in Section 7.

B.

Use of the Dialectical Method Will Show that the Discharges Were Proper and Lawful and that the Walkout Was Not Protected by the Act.

The development of the law governing contests between employer and employee is a living illustration of the dialectical resolution of opposing social forces.

The *thesis* is the employer's "right to carry on business — be it called liberty or property",[18] including the right to

[18] Brandeis, J., dissenting in *Truax v. Corrigan*, 257 U.S. 312, 354 (1921).

discipline and discharge employees, to the end of increasing the production and marketing of goods and services at as low a unit cost as possible.

The *antithesis* is the employees' right to organize, to bargain collectively and ultimately to strike in order to better their wages, hours and working conditions, and their place in society.

The resultant of the contests between capital and labor, crystallized from time to time into law by judicial decision and legislation, is an ever changing thing. But the *synthesis*, the unity of these different forces, is the supremacy of the public interest, in other words public policy.[19]

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[19] *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, 797 (1945) ("These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.")

National Labor Relations Board v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96 (1957) ("Although the Act protects the right of the employees to strike in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employers and employees collide. * * * The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility * * *.")

Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, 325 U.S. 797, 806 (1945). ("The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.").

Frankfurter and Greene, THE LABOR INJUNCTION (1930), pp. 24-25 (Quoting from Mr. Justice Holmes, as follows: "The inten-

The case at bar lends itself to dialectical analysis of the rights of the parties. The *thesis* is the employer's right to discharge employees so as to maintain plant discipline and to punish employees for walking out without notice or permission, in violation of company rules. The *antithesis* is the employees' right to engage in an unannounced economic "strike" without first stating their demands or purpose to their employer. The *synthesis* is to be found in public policy as it evolved in a series of legislative enactments, the more important being: the Erdman Act of 1898 (§ 10); the Clayton Act of 1914 (§§ 6 and 20); the Railway Labor Act of 1926 (§ 2); the Norris-LaGuardia Act of 1932 (§ 2); the National Industrial Recovery Act of 1933 (§ 7a); Public Resolution No. 44 of June 19, 1934; the Wagner Act of 1935; and the Taft-Hartley Act of 1947.[20]

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tional infliction of temporal damage is a cause of action, which, * * * requires a justification if the defendant is to escape. * * * in all such cases the ground of decision is policy; and the advantages to the community, on the one side and the other, are the only matters really entitled to be weighed.").

See also Mr. Justice Brandeis dissenting in *Truax v. Corrigan*, 257 U.S. 312, 357 (1921) ("The history of the rules governing contests between employer and employed in the several English-speaking countries illustrates both the susceptibility of such rules to change and the variety of contemporary opinion as to what rules will best serve the public interest."); and see Holmes, J., dissenting in *Vegelahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077, 1081 (1896).

[20] Excellent discussions of the statutory evolution of collective bargaining policy are found in Bernstein, THE NEW DEAL COLLECTIVE BARGAINING POLICY (1950); Millis and Brown, FROM THE WAGNER ACT TO TAFT-HARTLEY (1950); McNaughton and Lazar, INDUSTRIAL RELATIONS AND THE GOVERNMENT (1954). For earlier works, see Fisher, INDUSTRIAL DISPUTES AND FEDERAL LEGISLATION (1940); Rosenfarb, NATIONAL LABOR POLICY AND HOW IT WORKS (1940); Bowman, PUBLIC CONTROL OF LABOR RELATIONS (1942); McNaughton, THE DEVELOPMENT OF LABOR RELATIONS LAW (1941); Witte, THE GOVERNMENT IN LABOR DISPUTES (1932); Frankfurter and Greene, THE LABOR INJUNCTION (1930).

I.

The Thesis — The Right To Discharge

At common law, the right of the employer to discharge its employees was complete. In the absence of a contract specifying a term of employment, the employer could discharge for any reason or for no reason. He could discharge an employee simply for belonging to a labor union or otherwise engaging in union activity.[21] He could discharge an employee for abruptly leaving his job in disobedience of his employer's orders or rules.[22] The usual contract of employment, being terminable at will, imposed no legal limitations upon the right.

Early attempts by legislatures to aid the forces of labor by passing anti-discrimination statutes in order to prevent discharge of workmen for union activity, were frustrated by decisions of the Supreme Courts of the United States and nearly a dozen states holding such legislation to be unconstitutional.[23]

It was not until 1930 that this Court in upholding the constitutionality of the Railway Labor Act of 1926, imposed a significant qualification upon the previously unfettered right to discharge. In *Texas & New Orleans R. Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548

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[21] Witte, The Government in Labor Disputes (1932), pp. 211-12, 302-03. *Adair v. United States*, 208 U.S. 161, 174-75 (1908); *Coppage v. Kansas*, 236 U.S. 1, 11, 12 (1915); *Platt v. Philadelphia & R.R. Co.*, 65 Fed. 660 (E.D. Pa. 1894); *Rosenthal-Ettlinger Co. v. Schlossberg*, 149 Misc. 210, 266 N.Y. Supp. 762 (Sup. Ct. 1933).

[22] Laube, *The Right of an Employee Discharged for Cause*, 20 Minn. L. Rev. 597, 605-08 (1936); *Note*, 37 L.R.A. (N.S.) 950; See *Truax v. Raich*, 239 U.S. 33, 38 (1917) (an employee may be "discharged at any time for any reason or for no reason, the motive of the employer being immaterial", provided the employer's action is not because of unjustified interference of third persons.)

[23] *Adair v. United States, supra; Coppage & Kansas, supra;* and see cases cited in Witte, *op. cit.*, p. 212.

(1930), the Railroad, to purge itself of contempt, was ordered to reinstate certain employees who had been discharged because of union membership and union activity. This Court, in imposing limitations upon the employer's right to carry on its business, took care, however, to observe that the employer's right to discharge must give way only to the extent necessary to preserve the statutory rights of employees to be free from interference in organizational activity. Chief Justice Hughes said (p. 571):

> "The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing."[24]

Like the Railway Labor Act of 1926, the policy declaration of the Norris-LaGuardia Act, Section 7(a) of the National Industrial Recovery Act,[25] and the Wagner Act[26] did not place direct statutory limitations upon the unquestioned right to discharge. Rather, the limitations on the right in all three statutes are spelled out in identical terms which only protect employees against interference, restraint or coercion in the designation of representatives

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[24] For a similar statement as to a state statute, see Day and Hughes, JJ., dissenting in *Coppage v. Kansas*, 236 U.S. 1, 32, 40 (1915).

[25] See *Rosenthal-Ettlinger Co. v. Schlossberg*, 149 Misc. 210, 266 N.Y. Supp. 762 (Sup. Ct. 1933) (holding that the N.I.R.A. did not mean that an employer could not discharge an employee "for any reason, or for no reason" or that it had the burden to show good cause other than union affiliations.)

[26] H.R. Rep. No. 1147, 74th Cong., 1st Sess., p. 19 reads: "Nothing in this subsection [8(3)] prohibits interference with the normal exercise of the right of employers to select their employees or to discharge them. All that is intended is that the employer shall not by discriminatory treatment in hire or tenure of employment * * * interfere with the exercise by employees of their right to organize and choose representatives."

of their own choosing or in self-organization or "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." This Court has said time and again that the employer remains at liberty whenever and for whatever cause he sees fit, to discharge an employee except only as punishment for or discouragement of activities which the statutes affirmatively protect.

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937):

> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts. It would seem that when employers freely recognize the right of their employees to their own organizations and their unrestricted right of representation there will be much less occasion for controversy in respect to the free and appropriate exercise of the right of selection and discharge."

Associated Press v. National Labor Relations Board, 301 U.S. 103, 132 (1937):

> "The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. The restoration of Watson to his former position in no sense guarantees his continuance in petitioner's employ. The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as a punishment for, or discour-

agement of, such activities as the act declares permissible."

National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U.S. 240, 264 (1939):

> "But it does not follow because the section preserves this right to employees where they have ceased work by reason of a labor dispute or unfair labor practice, that its language is to be read as depriving the employer of his right, which the statute does not purport to withdraw, to terminate the employer-employee relationship for reasons dissociated with the stoppage of work because of unfair labor practices. The language which saves the employee status for those who have ceased work because of unfair labor practices does not embrace also those who have lost their status for a wholly different reason — their discharge for unlawful practices which the Act does not countenance."

These unequivocal pronouncements preserving the employer's right to discharge were codified into law in 1947 when Section 10(c) of the National Labor Relations Act was amended to provide: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." The Congressional purpose behind this amendment is quite clear. House Report No. 245, 80th Cong., 1st Sess., pages 42-43, reads in part:

> "Section 10(c). — This section, dealing with remedies the Board may prescribe, contains these three significant changes.
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> * * * * * *
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> "C. A third change forbids the Board to reinstate an individual unless the weight of the evidence shows that the individual was not suspended or discharged for cause. In the past, the Board, admitting that an

employee was guilty of gross misconduct, nevertheless frequently reinstated him, 'inferring' that, because he was a member or an official of a union, this, not his misconduct, was the reason for his discharge.

* * * * * *

"The change made in section 10(e) [sic] on this subject is intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct. The bill will require that the new Board's rulings shall be consistent with what the Supreme Court said in upholding the act, that it (the act) — 'does not interfere with the normal right of the employer to select its employees or to discharge them. * * * the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than * * * intimidation and coercion.' (*Labor Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 45-46). The Board may not 'infer' an improper motive when the evidence shows cause for discipline or discharge."

House Conference Report No. 510, 80th Cong., 1st Sess., pages 38-39, 55, makes reference to the subject provision in Section 10(c) both in its discussion of the rights of employers under Section 7 as well as in its discussion of Section 10(c). The Conference Report makes it clear that concerted activity does not immunize employees from discharge and that in case of conflict between the right to engage in concerted activity and the legitimate exercise of the right to discharge for cause, the latter right predominates. Thus, at pages 38-39 the Conference Report states:

"Thus the courts have firmly established the rule that under the existing provisions of section 7 of the

National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. In its most recent decisions the Board has been consistently applying the principles established by the courts. * * * The reasoning of these recent decisions appears to have had the effect of overruling such decisions of the Board as that in *Matter of Berkshire Knitting Mills* (46 N.L.R.B. 955 (1943)), wherein the Board attempted to distinguish between what it considered as major crimes and minor crimes for the purpose of determining what employees were entitled to reinstatement.

"By reason of the foregoing, it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of section 7 were unnecessary. Moreover, there was real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the act.

"In addition, other provisions of the conference agreement deal with this particular problem in general terms. For example, in the declaration of policy to the amended National Labor Relations Act adopted by the conference committee, it is stated in the new paragraph dealing with improper practices of labor organizations, their officers, and members, that the 'elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.' This in and of itself demonstrates a clear intention that these *undesirable concerted activities are not to have any protection under the act*, and to the extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection no longer possible. Furthermore, in section 10(c) of the amended act, as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if

such individual was suspended or discharged for cause. *and this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity.*" (Emphasis supplied.)

And at page 55 the Conference Report states:

"(10) The House bill also included, in section 10(c) of the amended act, a provision forbidding the Board to order reinstatement or back pay for any employee who had been suspended or discharged, unless the weight of the evidence showed that the employee was not suspended or discharged for cause. The Senate amendment contained no corresponding provision. The conference agreement omits the 'weight of evidence' language, since the Board, under the general provisions of section 10, must act on a preponderance of evidence, and simply provides that no order of the Board shall require reinstatement or back pay for any individual who was suspended or discharged for cause. *Thus employees who are discharged* or suspended for interfering with other employees at work, whether or not in order to transact union business, or *for engaging in activities, whether or not union activities, contrary to shop rules,* or for Communist activities, or for other cause (see *Wyman-Gordon v. N.L.R.B.*, 153 Fed. (2) 480), *will not be entitled to reinstatement.* The effect of this provision is also discussed in connection with the discussion of section 7." (Emphasis supplied.)

And on page 59 of the Conference Report it is stated:

"Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the act and are subject to discharge without right of reinstatement. The right of the employer to discharge an employee for

any such reason is protected in specific terms in section 10(c)."

Considerable fear was expressed that the subject amendment to Section 10(c) would permit an employer to escape liability for the discharge of an employee for union activities on the pretext that other grounds existed to justify the discharge.[27] To these fears Senator Taft replied,[28]

> "If a man is discharged for cause, he cannot be reinstated. If he is discharged for union activity, he must be reinstated. In every case it is a question of fact for the Board to determine. * * * For years it has had to determine in every case whether a man was discharged for cause or for union activity. In my opinion this language in no way changes the existing provision of law, after the modification which we forced in the House provision."

1.

Of Necessity, the Employer's Motive in Exercising Its Right to Discharge Must Be Proved

Where the discharge is for reasons closely related to but separable from the concerted behavior of the employees, it has been unequivocally pointed out both by Congress[29] and this Court[30] that the concerted activity does not confer immunity from discharge even though it occurs in the course of a labor dispute. The fact that the reasons for the

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[27] House Minority Report No. 245, 80th Cong., 1st Sess., pp. 92-93; Senator Murray, *Cong. Record*, 80th Cong., 1st Sess., pp. 6659, 6665; Senator Pepper, *Cong. Record*, 80th Cong., 1st Sess., p. 6677; President Truman's veto message, June 20, 1947, *Cong. Record*, 80th Cong., 1st Sess., p. 7501.

[28] *Cong. Record*, 80th Cong., 1st Sess., p. 6677.

[29] H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 39.

[30] *Automobile Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245, 257, 264-(1949); *National Labor Relations Board v. International Brotherhood of Electrical Workers*, 346 U.S. 464, 477-78 (1953).

discharge coincide with and stem from certain phases of the concerted activity is not at all controlling. "It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test." *Teamsters Local v. National Labor Relations Board*, 365 U.S. 667, 675 (1961). "The relevance of the motivation of the employer * * * has been consistently recognized." *Radio Officers Union v. National Labor Relations Board*, 347 U.S. 17, 43 (1954).

From their earliest beginnings the National Labor Board,[31] the old National Labor Relations Board established under Public Resolution No. 44[32] and the present National Labor Relations Board operating under the Wagner Act[33] found themselves continually faced with the problem of ascertaining "true purpose" and "real motive" behind the discharge of employees.

Courts have often differed with findings of the Board to reach the conclusion that upon the evidence on the record considered as a whole, the motivation of the employer behind the discharge was not one condemned by the National Labor Relations Act.[34]

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[31] Spencer, COLLECTIVE BARGAINING UNDER SECTION 7(a) OF THE NATIONAL INDUSTRIAL RECOVERY ACT, University of Chicago Press (1935), pp. 73, 78. Bernstein, THE NEW DEAL COLLECTIVE BARGAINING POLICY (1950), pp. 60-61.

[32] Bernstein, *op. cit.*, p. 85; Note, *The Decisions of the National Labor Relations Board*, 48 Harv. L. Rev. 630, 650-52 (1935); Note, *Labor Law — The Present State of Section 7(a)*, 21 Va. L. Rev. 677, 685-86 (1935).

[33] Rosenfarb, NATIONAL LABOR POLICY AND HOW IT WORKS (1940), pp. 165, 175-76; Ward, *"Discrimination" Under the National Labor Relations Act*, 48 Yale L.J. 1152, 1164-65, 1187-92 (1939); Daykin, *The Employer's Right to Discharge Under the Wagner Act*, 24 Iowa L. Rev. 660, 662-71 (1939).

[34] See *e.g., Victor Manufacturing & Gasket Co. v. National Labor Relations Board*, 174 F. 2d 867, 868 (7th Cir. 1949); *National Labor Relations Board v. Industrial Cotton Mills*, 208 F. 2d 87 (4th Cir. 1953), *cert. denied*, 347 U.S. 935; *Southern Oxygen Co. v. National Labor Relations Board*, 213 F. 2d 738 (4th Cir. 1954);

2.

The Record Considered as a Whole Does Not Disclose One Scintilla of Evidence of Improper or Unlawful Motive and the Board Failed to Meet its Burden of Proof.

While recognizing that specific evidence of motive is not indispensable and that an inference of improper motive may be drawn where the foreseeable consequence of employer conduct is the discouragement of union membership or organizational activity, (*Radio Officers Union v. National Labor Relations Board, supra* at 45), no such consequence was possibly foreseeable in this case. The Board is entitled to draw reasonable inferences from the evidence, but it cannot create inferences where there is no substantial evidence to support them. There is no evidence in the record of any previous threats of dismissal. There is no evidence of discrimination or of any inequality of treatment of these or any other employees either as to firing or as to reinstatement. There is no evidence of a current labor dispute or of any previous attempts to organize a protest against or a voice of dissatisfaction with working conditions. The charge of discrimination under Section 8(a)(3) was not proved. The Trial Examiner stated "No labor organization is alleged to be, nor was any proved to be, involved in Case No. 5-CA-1498" (R. 12).

The burden of proving that the employer discharged the men with the conscious purpose of interfering with their rights guaranteed by Section 7 is upon the General Counsel for the Board.[35] In *National Labor Relations Board v. Ford*

National Labor Relations Board v. Ford Radio & Mica Corp., 258 F. 2d 457 (2nd Cir. 1958); *National Labor Relations Board v. Walton Manufacturing Co.*, 286 F. 2d 16 (5th Cir. 1961), *cert. granted*, 368 U.S. 810, *argued*, March 19, 1962.

[35] *National Labor Relations Board v. Rickel Bros., Inc.*, 290 F. 2d 611 (3rd Cir. 1961); *National Labor Relations Board v. Birmingham Publishing Co.*, 262 F. 2d 2 (5th Cir. 1959); *Miller Electric*

Radio & Mica Corp., 258 F. 2d 457 (2nd Cir. 1958), the court said (p. 461):

> "Regardless of whatever concerted activities the employees were engaging in, if they were discharged for any other reason, the employer does not violate the Act. Thus the motivation of the employer in ordering the discharge is the crucial element in establishing a violation. [Citations omitted]. The burden is upon the General Counsel for the Board to show that the employer knew the employees were engaging in protected concerted activities and that they were discharged for engaging in such activities."

The true reasons for the discharges, nothing more, nothing less, were that the men walked off their jobs without the permission of their foreman, without informing him of the action they were taking and without giving management any notice whatsoever of the reason or purpose behind the walk-out. If there was any concerted action within the meaning of Section 7, the employer was altogether unaware of its existence. Patently, the only motive behind the employer's action was to maintain plant discipline and insure compliance with plant rules. The discharges, meted out to punish insubordination and infraction of plant rules, were made in the free exercise of the employer's traditional right to carry on its business in any manner in which it sees fit, provided only that its action be free from any motive or purpose to interfere with employee rights secured by the National Labor Relations Act.

II.

The Antithesis — The Right To Strike

Until 1932, the framework of the right to strike evolved largely as a result of judicial determination by the gradual

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Manufacturing Co., Inc. v. National Labor Relations Board, 265 F. 2d 225 (7th Cir. 1959); *National Labor Relations Board v. Kaiser Aluminum Chemical Corp.*, 217 F. 2d 366 (9th Cir. 1954).

process of judicial inclusion and exclusion.[36] Legislative attempts to enlarge the right (except those applicable to the railroad industry) had been swept aside or rendered ineffective by the courts.[37] From 1842 until 1932, the most that the "right to strike" meant to workmen was the right to cease work peacefully in a body for a lawful purpose without being liable for punishment for the crime of conspiracy. The right was subject to destruction and was frequently destroyed by injunction, by discharge and by other forms of employer retaliation. This fact necessitates the careful use of terminology, for a right is not a true right if it can be destroyed — it is only a privilege.[38] Thus as of 1932, Hohfeld would term the "right" to strike nothing more than a privilege, inasmuch as there was no correlative duty on the part of either the employer or the judicial system not to interfere therewith.

1.

The Norris-LaGuardia Act

In 1932, the right to strike took on some of the aspects of a true right in the sense that the Norris-LaGuardia Act imposed a correlative duty upon the judiciary not to interfere

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[36] Mason, *The Right to Strike*, 77 U. Pa. L. Rev. 52 (1928); Storey, *The Right to Strike*, 32 Yale L. J. 99 (1922); Comment, *"Developing Ethics" and the "Right to Strike"*, 32 Yale L. J. 157 (1922). Oakes, ORGANIZED LABOR AND INDUSTRIAL CONFLICTS (1927). Millis and Brown, FROM THE WAGNER ACT TO THE TAFT-HARTLEY (1950), pp. 3-18. Two landmark decisions are *Commonwealth v. Hunt*, 4 Metcalf 111 (Mass. 1842); *American Steel Foundaries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921).

[37] Frankfurter and Greene, THE LABOR INJUNCTION (1930), pp. 134-98.

[38] Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L. J. 16 (1913); Comment, *"Developing Ethics" and the "Right to Strike"*, 32 Yale L. J. 157 (1932). McNaughton, THE DEVELOPMENT OF LABOR RELATIONS LAW (1941), pp. 140-41. Hohfeld's jural opposites include right:no-right and privilege:duty. His jural correlatives include right:duty and privilege:no-right.

by injunctive process with a strike involving or growing out of a labor dispute.[39] In terms of correlative duties of the employer, however, the "right" was still only a privilege, for the employer remained free to interfere by discharging at will any or all participants in the strike for any reason whatever and hiring replacements in their stead.

Moreover, in attempting to give "the equality of position between the parties in which liberty of contract begins"[40] to workers by depriving employers of certain judicial remedies, the Norris-LaGuardia Act neither approved of strikes nor enlarged the right to strike.[41] In a manner evincing disapproval of unilateral action analogous to the Railway Labor Act of 1926, it required that an effort be made to settle disputes by negotiation and mediation before its provisions could be availed of.[42]

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[39] In the absence of a "labor dispute", the Norris-LaGuardia Act does not prohibit the issuance of an injunction. 47 Stat. 70; 29 U.S.C. §§ 104, 113. See *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940); *Columbia River Packers Association, Inc. v. Hinton*, 315 U.S. 143 (1942); *Order of Railroad Telegraphers v. Chicago & North Western Rwy. Co.*, 362 U.S. 330 (1960).

[40] Mr. Justice Holmes dissenting in *Coppage v. Kansas*, 236 U.S. 1, 27 (1915).

[41] In the House Debates, Mr. O'Conner of New York remarked, "Personally, I believe in organized labor. Capital is organized, and labor should have the right to organize and should be protected in lawful organization. I am opposed to strikes and do not believe that this is a bill to authorize strikes." *Cong. Record*, 72nd Cong., 1st Sess., p. 5465. See also, Sen. Rep. No. 163, 72nd Cong., 1st Sess., p. 10: "The primary object of the proposed legislation is to protect labor in the lawful and effective exercise of its conceded rights — to protect, first, the right of free association and, second, the right to advance the lawful object of association."

[42] Section 8 of the Act, 29 U.S.C. § 108, denies injunctive relief to any complainant "who has failed to make every reasonable effort to settle such [labor] dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." This section was inserted in the law as "an application of two familiar maxims of equity — 'he who comes into equity must

2.

The Railway Labor Act

In 1930 in the railroad industry only, certain rights of labor took on the aspects of true rights when this Court, in *Texas & New Orleans R. Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930), upheld the Railway Labor Act of 1926 and the statutory imposition of correlative duties upon railroad carriers not to interfere with "appropriate collective action" on the part of the employees in the selection of representatives "for the purpose of negotiation and conference between employers and employees." 44 Stat. 577, Section 2, Third; 45 U.S.C. § 152, Third. But these rights thus preserved by statute, did not include the absolute, uninhibited right to strike.

To the contrary, the right to strike was drastically curtailed. Section 2, First, of the Act[43] made it the duty of the carriers and their employees alike "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes * * *." Failing settlement by conference, the Act provided for mediation by a Board of Mediation, and, if that failed, by voluntary arbitration, and, if that failed, by conciliation through a board created by the President. The presidential emergency board was required to investi-

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come with clean hands', and 'he who seeks equity must do equity'. It is surely a fair requirement that one who invokes the extraordinary jurisdiction of a court should prove that he has exhausted all reasonable means for the peaceful settlement of a labor dispute. * * * A wise social policy may well consider the manner in which parties exercise their legal rights before putting all the coercive powers of society behind those rights." Frankfurter and Greene, THE LABOR INJUNCTION (1930), pp. 222-23. See also, Sen. Rep. No. 163, 72nd Cong., 1st Sess., p. 22; Senator Blaine, *Cong. Record*, 72nd Cong., 1st Sess., p. 4630; Rep. O'Conner, *Cong. Record*, 72nd Cong., 1st Sess., p. 5465.

[43] 44 Stat. 577, Section 2, First; 45 U.S.C. § 152, First.

gate and report within thirty days; and for thirty days after the board had made its report, "no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose".[44] In other words, the right to strike was both conditioned upon and subordinated to conference, negotiation, mediation, arbitration, the creation of a presidential board, *and then* a sixty day waiting period. The major objective of the Act "is the avoidance of industrial strife, by conference between the authorized representatives of employer and employee." *See Virginia Railway Co. v. System Federation No. 40*, 300 U.S. 515, 547 (1937); *International Association of Machinists v. Street*, 367 U.S. 740 (1961).

It may safely be said, without equivocation, that national policy insofar as the railroad industry is concerned is unalterably opposed to unannounced strikes engaged in without opportunity for conference or negotiation.

3.

The National Industrial Recovery Act

Returning to industry in general, the next instance of legislation which gave some meaning to the right to strike by imposing correlative duties upon employers, occurred in 1933 with the adoption of Section 7(a) of the National Industrial Recovery Act.[45] This statute, however, like those which preceded it, did not by its terms define or grant the right to strike. Borrowing its crucial language verbatim from the policy declaration (Section 2) of the Norris-LaGuardia Act,[46] Section 7(a) required employers

[44] 44 Stat. 577, Section 10; 45 U.S.C. § 160.

[45] 48 Stat. 195, 15 U.S.C. § 707(a).

[46] Section 2 of the Norris-LaGuardia Act is set forth in full in Appendix A, *infra*. It was originally drafted in the spring of 1928 by a subcommittee of the Senate Committee on Education and Labor, consisting of Professors Felix Frankfurter and Francis B. Sayre

to adopt codes of fair competition which had to provide that "employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[47] Two years later

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of Harvard, Professor Oliphant of Columbia, Dr. Edwin E. Witte of Wisconsin and Donald R. Richberg, principal draftsman of the Railway Labor Act of 1926 and of Section 7(a) of the National Industrial Recovery Act. See Sen. Rep. No. 163, 72nd Cong., 1st Sess., p. 3; Sen. Minority Rep. No. 1060, Pt. 2, 71st Cong., 2nd Sess., p. 5. Richberg, THE RAINBOW (1936), p. 52. Witte, THE GOVERNMENT IN LABOR DISPUTES (1932), p. 274. Commenting upon the preamble in their book THE LABOR INJUNCTION, Frankfurter and Greene said (p. 212): "The need for legislative assertion arises, as we have seen, from the fact that in action the courts have honored this policy more in the breach than in the observance. The new legislative exordium is doubtless also susceptible of judicial evaporation. But in its setting, the section is useful rhetoric. It is intended as an explicit avowal of the considerations moving Congressional action and, therefore, controlling any loyal application of national policy by the courts. For it is the primary function of the legislature to define public policy. Apart from policies implied in constitutional limitations, the courts express policy only when the legislature is silent or ambiguous."

[47] Section 7(a) of the National Industrial Recovery Act is set forth in full in Appendix A, *infra*. The last phrase of Section 7(a)(1) was carried over verbatim from the preamble of the Norris-LaGuardia Act upon the urging of A.F.L. President William Greene, who said, "This amendment does not include within it any form of new legislation. It is a verbatim statement taken from the declared public policy of the Government as set forth in the Norris-LaGuardia anti-injunction law. * * * Labor believes it necessary in order to confirm and emphasize the guaranty of the right of organization and of the exercise of collective bargaining.

"* * * There will be no departure from policies heretofore pursued: we are not asking that something new be incorporated, but that we lift out of that declared public policy this section and include it in this emergency legislation, for the reason that labor will then feel better satisfied that its right to organize is really guaranteed, and that it will be permitted to exercise freedom of action in that direction." National Industrial Recovery, *Hearings on H.R. 5664 before the Committee on Ways and Means*, 73rd Cong., 1st Sess., p. 117.

this language, almost without change, became Sections 7 and 8(1) of the Wagner Act. In the meantime, the right to strike received direct legislative expression for the first time.

4.

Public Resolution No. 44

In 1934, after Senator Wagner's Labor Disputes bill, Senate Bill 2926,[48] and Senator Walsh's National Industrial Adjustment bill[49] failed to pass because of the unfavorable response of both industry and labor, President Roosevelt submitted Public Resolution No. 44[50] to the Congress, in an effort to secure effective enforcement of Section 7(a) of the N.I.R.A. The Resolution would empower the President to establish a new Board with authority to investigate labor controversies and conduct representation elections. On the floor of the Senate, on motion of Senator LaFollette, Section 6 was added to the Resolution to provide "Nothing in this resolution shall prevent or impede or diminish in any way the right of employees to strike or engage in other concerted activities".[51]

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[48] Section 303 of this bill provided, "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike." This language was later modified by Senator Wagner to conform to the language of the Thirteenth Amendment. Bernstein, THE NEW DEAL COLLECTIVE BARGAINING POLICY (1950), pp. 66, 72.

[49] Section 14 of this bill replaced the language of Senator Wagner's bill protecting the right to strike with a prohibition on requiring an employee to render labor without his consent and on the issuance of injunctions to compel such service. Bernstein, *op. cit.* p. 74. Compare Section 9, Eighth of the Railway Labor Act, 45 U.S.C. § 159, Eighth, and Section 502 of the Taft-Hartley Act, 29 U.S.C. § 143.

[50] 48 Stat. 1183, 15 U.S.C. §§ 702a-702f; *Cong. Record*, 73rd Cong., 2nd Sess., pp. 12044-46.

[51] Senator Walsh did not object to the Amendment, but considered it unnecessary inasmuch as the Board's authority would be severely limited, and, in fact, the language had been considered and re-

But even after the National Labor Relations Board established under Public Resolution No. 44 began to hear and decide cases of discriminatory discharge, the right to strike was hardly a true right. Board orders, like those of the National Labor Board before it, requiring reinstatement of employees, were ignored by employers with impunity.[52] And even these orders protected strikers from discharge only in those limited cases where there was substantial evidence of discrimination. The employer's right to hire and fire was restricted only in so far as his motive was animus against unionism and union organizers. "Where a strike was caused by the employer's violation of 7(a), NLRB returned the workers to their jobs without prejudice. Where there was no such breach, strikers had no legal claim to restoration."[53]

5.

The Wagner Act

Finally in 1935, borrowing heavily from all the above mentioned legislation, Congress passed the Wagner Act. Sections 7 and 8(1) imposed a duty upon employers not to interfere with employee rights to self-organization, to collective bargaining through representatives of their own choosing "and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 13 provided, "Nothing in this Act

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jected in the drafting of the Resolution. Senator Walsh said, "There is absolutely no need of this prohibitive clause against action which would deny the right to strike, because of the fact that the Board provided for would only be empowered to investigate." Senator LaFollette, while inclined to agree, pointed to the concern of labor and noted there would be no harm in the double safeguard. Whereupon the Amendment was adopted. *Cong. Record*, 73rd Cong., 2nd Sess., pp. 12044-46.

[52] Bernstein, *op. cit.*, pp. 62, 87.

[53] Bernstein, *op. cit.*, p. 85.

shall be construed so as to interfere with or impede or diminish in any way the right to strike". The words "or engage in other concerted activities" were not carried over to Section 13 from Public Resolution No. 44 manifestly because the right to engage in other concerted activities was protected by Sections 7 and 8(1) of the Act.

Section 13 was not enacted into law to protect strikers from discharge, but rather to prevent any misconception that the Wagner Act intended to substitute collective bargaining rights, procedures and remedies for and in deprivation of the right to strike. Section 7(a) of the National Industrial Recovery Act had been so construed by a lower court just prior to the time Section 13 was drafted.[54]

Whether or not it was aware of the New Jersey case, the Congress did have in mind the mandatory mediation procedures set forth in the Railway Labor Act. In *American News Co.*, 55 NLRB 1302 (1944), the Board placed Section 13 in its proper perspective as follows:

> "As the legislative history shows, this provision was inserted to underscore the distinction between the National Labor Relations Act and its companion legislation, the Railway Labor Act, 44 Stat. 577, as amended, which placed specific restrictions in the form of waiting periods upon strikes by railway employees. The instant case involves no question of restricting the right to strike. The sole question presented is whether or not the respondent's treatment of the strikers under the circumstances in this case was an unfair labor practice.

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[54] In *Bayonne Textile Corp. v. American Federation of Silk Workers*, 114 N.J. Eq. 307, 168 Atl. 799 (1933), *modified*, 116 N.J. Eq. 146, 172 Atl. 551 (1934), the lower court held that the policy of the National Industrial Recovery Act and the means afforded to mediate grievances *deprived* employees of the right to strike against an employer operating under an approved code, saying, "Courts of equity cannot countenance strikes * * *, when no fair effort has been made to adjust alleged grievances."

> In the decisions in which this Board has given affirmative relief to discharged strikers it has never relied upon Section 13, but rather upon the provisions of Section 8(1) and (3) of the Act."

And in *Automobile Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949), this Court said (pp. 258-59):

> "Unless we read into §13 words which Congress omitted and a sense which Congress showed no intention of including, all that this provision does is to declare a rule of interpretation for the Act itself which would prevent any use of what originally was a novel piece of legislation to qualify or impede whatever right to strike exists under other laws. It did not purport to modify the body of law as to the legality of strikes as it then existed."

6.

The Taft-Hartley Act

From 1935 to 1947, the exercise of the right to strike attained its full potential but it also resulted in a legislative reappraisal. Ultimately, the pendulum of public opinion swung away from the desire to equalize bargaining power by imposing duties upon employers to the desire to impose certain duties and responsibilities upon employees and their representatives as well.[55] In 1947, the Taft-Hartley Act made certain types of strikes unlawful (Sections 8(b)(4), 303 and 305) and imposed restrictions upon others (Section 8(d)).

Manifestly in the light of Sections 8(b)(4), 8(d), 303 and 305, the Taft-Hartley Act amended Section 13 of the Wagner Act so as to provide:

> "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere

[55] See Millis and Brown, FROM THE WAGNER ACT TO TAFT-HARTLEY (1950), pp. 271-392.

with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.[56]

Neither the Wagner Act nor the Taft-Hartley Act defined the word "strike" as such. Section 501(2) of the Taft-Hartley Act, however, did provide:

"The term 'strike' *includes* any strike or other concerted stoppage of work by employees (including a

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[56] Sen. Rep. No. 105, 80th Cong., 1st Sess., p. 28, states:

"Section 13 has been amended in two respects: (1) By a clause which makes clear that the Wagner Act has diminished the right to strike only to the extent specifically provided by the new amendments to the act; (2) by the addition of the words 'to affect the limitations or qualifications on that right.'

"It should be noted that the Board has construed the present act as denying any remedy to employees striking for illegal objectives. (See *American News Co.*, 55 N.L.R.B. 1302, and *Thompson Products*, 72 N.L.R.B. 150.) The Supreme Court has interpreted the statute as not conferring protection upon employees who strike in breach of contract (*N.L.R.B. v. Sands Manufacturing Company*, 306 U.S. 332); or in breach of some other Federal Law (*Southern Steamship Company v. N.L.R.B.*, 316 U.S. 31); or who engage in illegal acts while on strike (*Fansteel Metallurgical Corp. v. N.L.R.B.*, 306 U.S. 240).

"This bill is not intended to change in any respect existing law as construed in these administrative and judicial decisions."

And see H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 59:

"Section 13 of the existing National Labor Relations Act provides that nothing in the act is to be construed so as to either interfere with or impede or diminish in any way the right to strike. Under the House bill, in section 12(e), a provision was included to the effect that except as specifically provided in section 12 nothing in the act should be so construed. Under the Senate amendment, in section 13, section 13 of the existing law was rewritten so as to provide that except as specifically provided for in the act, nothing was to be construed so as either to interfere with or impede or diminish in any way the right to strike. The Senate amendment also added one other important provision to this section, providing that nothing in the act was to affect the limitations or qualifications on the right to strike, thus recognizing that the right to strike is not an unlimited and unqualified right. The conference agreement adopts the provisions of the Senate amendment."

stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees."

It can be argued that Section 501(2) of Title V should not apply to Title I inasmuch as Title I already contains a definitions section and insasmuch as Title V incorporates as its own definitions for the purposes of the Labor Management Relations Act the Title I definitions, thereby implying that the two Titles should stand separate and apart. The brief for the Board in *National Labor Relations Board v. Insurance Agents' International Union*, October Term 1959, No. 15, pages 33 to 35, argues persuasively that Section 501(2) should *not* be read into Section 13 so as to afford the protection of Section 13 to slow-downs and other concerted interruptions of work, because the purpose of Section 501(2) was to bring slow-downs and partial strikes and the like within the prohibitions and penalties against strike action contained in Sections 8(b)(4) and 8(d) of the amended National Labor Relations Act and Sections 303 and 305 of the Labor Management Relations Act. If Section 502 is read *in pari materia* with these sections, the argument becomes even stronger.

This Court made reference to Section 501(2) in its consideration of Section 13 in *Automobile Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245, 258 (1949). The majority of this Court were of the view that the *Automobile Workers* case held that Section 501(2) was only to be considered in connection with Section 8(b)(4) and not with Section 13. *National Labor Relations Board v. Insurance Agents' International Union*, 361 U.S. 477, 494, n. 23 (1960). Mr. Justice Frankfurter disagreed. *Id.*, 361 U.S. at 511, n. 6.

But whether or not Section 501(2) is to be read into Section 13 is immaterial under the facts of this case for two reasons. *First*, as already stated, Section 13 is simply a rule of construction and does not purport to enlarge or modify the right to strike as it existed under other laws, and, *Second*, neither Section 13 nor Section 501(2) defines the term "strike" as such, Section 501(2) stating only what the term "includes" without defining the meaning of the term.

All accepted definitions of the term "strike"[37] require that the concerted work stoppage be preceded by a demand by the employees for some concession from their employer, or in other words, a current labor dispute. "*It is not a strike if employees temporarily stop work without making a demand upon the employer or using the stoppage as a means of exacting a concession from him, even if the stoppage is against his will.*" Restatement of *Torts*, Section 797, comment a. Accordingly, the walkout involved in this case is not a strike within the meaning of the language of Section 13.

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[37] See Webster's, NEW INTERNATIONAL DICTIONARY (Second Edition 1959); Funk and Wagnall's, NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE (1959 Edition); THE OXFORD ENGLISH DICTIONARY (1933 Edition); Stroud's, JUDICIAL DICTIONARY (Third Edition 1953); Black's, LAW DICTIONARY (Fourth Edition 1951); Restatement of *Torts*, Section 797, comment a; Teller, LABOR DISPUTES AND COLLECTIVE BARGAINING (1940), Section 78; *Jeffrey-DeWitt Insulator Co. v. National Labor Relations Board*, 91 F. 2d 134, 138-39 (4th Cir. 1937), *cert. denied*, 302 U.S. 731; *C. G. Conn, Limited v. National Labor Relations Board*, 108 F. 2d 390, 397 (7th Cir. 1939); *National Labor Relations Board v. Illinois Bell Telephone Co.*, 189 F. 2d 124, 127 (7th Cir. 1951), *cert. denied*, 342 U.S. 885; *Sandoval v. Industrial Commission*, 110 Colo. 108, 130 P. 2d 930 (1942). The definitions of the term "strike" are fully set forth in Appendix B, *infra*.

7.

The Walkout Did Not Occur in the Course of A Current Labor Dispute and Hence Was Neither A Strike Nor A Protected Concerted Activity. Under Such Circumstances, Section 2(3) Is Inapplicable.

The same equation, i.e., a strike equals a work stoppage plus a current labor dispute, is to be found in Sections 2(3) and 2(9) of the Act, discussed below, which require the existence of a current labor dispute before concerted activity can be protected by way of reinstatement of discharged strikers. The holding in *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), which invoked Section 7 to protect a strike as concerted activity, was necessarily based on the existence of a current labor dispute. This Court said (p. 344):

> "Under the findings the strike was a consequence of, or in connection with, a current labor dispute as defined in § 2(9) of the Act. * * * there were pending negotiations for the execution of a contract touching wages and terms and conditions of employment. * * * within the intent of the Act there was an existing labor dispute in connection with which the strike was called."

In *National Labor Relations Board v. Jamestown Veneer & Plywood Corp.*, 194 F. 2d 192 (2nd Cir. 1952), certain employees who petulantly walked out in protest of a short two and one-half hour notice of a lay- off, were denied the protection of Section 7, the court saying (p. 194):

> "There was no labor dispute pending as to how long a lay-off notice should be. The four employees who quit were provoked at the shortness of the notice. Their leaving had nothing to do with 'collective bargaining or other mutual aid or protection' either present or future so far as appears."[38]

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[38] See also, *National Labor Relations Board v. Massey Gin & Machine Works, Inc.*, 78 NLRB 189, *enforcement denied*, 173 F. 2d

In the case at bar the men were not disputing with anybody prior to their walkout. There must be disputants before there can be a labor dispute, just as there must be two parties to a bargain or negotiations for a bargain before there can be a duty to bargain. See *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 297 (1939).[59] Similarly, there can be no dispute when there is nothing over which the parties disagree. The employer, as fervently as the employees, wanted the cold condition, which resulted from mechanical failure, corrected.

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758 (5th Cir. 1949), *cert. denied*, 338 U.S. 910; *National Labor Relations Board v. Reynolds International Pen Co.*, 162 F. 2d 680, 684 (7th Cir. 1947) ("Moreover, assuming the validity of the Board's finding that the walkout was attributable to rumors of a wage decrease, we still think it was unauthorized. It must be kept in mind that at the time of the walkout no demand had been made upon management concerning wages and no bargaining in reference thereto had been undertaken or suggested. In fact, there was no existing labor dispute or controversy of any character."); *National Labor Relations Board v. Sunset Minerals, Inc.*, 211 F. 2d 224 (9th Cir. 1954); *National Labor Relations Board v. Office Towel Supply Co., Inc.*, 201 F. 2d 838 (2nd Cir. 1952) (mere griping or grousing is far too "inchoate" an activity to be protected by Section 7); *Terri Lee, Inc.*, 107 NLRB 560, 562 (1953), (a walkout without permission "without any purpose thereby of protesting * * * or of seeking any concession" is not protected).

[59] "Since there must be at least two parties to a bargain and to any negotiations for a bargain, it follows that there can be no breach of the statutory duty by the employer — when he has not refused to receive communications from his employees — without some indication given to him by them or their representatives of their desire or willingness to bargain. In the normal course of transactions between them, willingness of the employees is evidenced by their request, invitation, or expressed desire to bargain, communicated to their employer.

"However desirable may be the exhibition by the employer of a tolerant and conciliatory spirit in the settlement of labor disputes, we think it plain that the statute does not compel him to seek out his employees or request their participation in negotiations for purposes of collective bargaining, and that he may ignore or reject proposals for such bargaining which come from third persons not purporting to act with authority of his employees, without violation of law and without suffering the drastic consequences which violation may en-

We agree with that part of Judge Sobeloff's dissent (R. 125) to the effect that advance notice of a strike or the lack of it is not crucial or material, so long as it is a full strike not a partial strike.[60] It is not advance notice, but the existence of a current labor dispute that is all important if the employees are to preserve rights to reinstatement under the Act.

The Petitioner's argument (Brief, pp. 18-19) that Section 7 should be construed to protect a walkout engaged in without advance notice where a working condition suddenly becomes intolerable is not persuasive. In the first place, the Board expressly found that in this case the working conditions were not intolerable (R. 3, n. 2). Secondly, a walkout by workers to protect themselves from intolerable conditions is expressly protected, not by Section 7, but by Section 502 (29 U.S.C. § 143); and such

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tail. To put the employer in default here the employees must at least have signified to respondent their desire to negotiate." *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 297-98 (1939).

[60] It has been suggested that in the case of "hit-and-run" or "quickie" strikes, notice should be required to be given to the employer so as to give the employer the opportunity to require of his employees (1) uninterrupted work, or (2) a full strike, the latter which would enable him to replace workers and thus carry on his business. Comment, *The Partial Strike*, 21 U. of Chi. L. Rev. 765 (1954). This is but a refinement of settled law that employees cannot work and strike at the same time nor fix the hours of or the terms and conditions affecting their employment. *C.-G. Conn, Limited v. National Labor Relations Board*, 108 F. 2d 390, 397 (7th Cir. 1939); *National Labor Relations Board v. Condenser Corporation of America*, 128 F. 2d 67, 77 (3rd Cir. 1942); *National Labor Relations Board v. Montgomery Ward & Co., Inc.*, 157 F. 2d 486, 496 (8th Cir. 1946); *Hoover Co. v. National Labor Relations Board*, 191 F. 2d 380, 389 (6th Cir. 1951); *National Labor Relations Board v. Rockaway News Supply Co., Inc.*, 197 F. 2d 111, 113-14 (2nd Cir. 1952), *affirmed*, 345 U.S. 71 (1953); *Home Beneficial Life Insurance Co., Inc. v. National Labor Relations Board*, 159 F. 2d 280, 286 (4th Cir. 1947), *cert. denied*, 332 U.S. 758; *National Labor Relations Board v. Kohler Company*, 220 F. 2d 3, 11 (7th Cir. 1955).

protection will be afforded employees *under Section 502* even if the walkout is in violation of a no-strike clause in a contract. *National Labor Relations Board v. Knight Morley Corp.*, 251 F. 2d 753 (6th Cir. 1957), *cert. denied*, 357 U.S. 927.

Petitioner's brief has not cited a single case in which an unannounced walkout was protected by Section 7 in which there was not also a current labor dispute. The cases of *National Labor Relations Board v. Southern Silk Mills, Inc.*, 209 F. 2d 155 (6th Cir. 1953), *rehearing denied*, 210 F. 2d 824 (6th Cir. 1954), *cert. denied*, 347 U.S. 976; *National Labor Relations Board v. Solo Cup Co.*, 237 F. 2d 521 (8th Cir. 1956); and *National Labor Relations Board v. Kennametal, Inc.*, 182 F. 2d 817 (3rd Cir. 1950), and the others cited by Petitioner, were clearly distinguished by the court below (R. 120, n. 10). Each of them featured some employee protest or demand or some labor dispute to which the employer was a party.

8.

Even If It Occurs In The Course Of A Labor Dispute, An Unannounced Walkout Without Stated Purpose Or Objective Is Not Protected By Section 7. Public Policy Requires That An Economic Strike Be Preceded By Some Attempt To Settle The Dispute By Conference Or Negotiation.

Both Senator Wagner, prior to the passage of the Wagner Act, and Senator Taft, prior to the passage of the Taft-Hartley Act, made it quite clear that, while the underlying policy of the respective laws being proposed by them was not to outlaw strikes, it was hoped that the laws would eliminate strikes except as a last resort after conference and mediation had been tried without success. Senator Wagner, discussing Section 7(a) of the N.I.R.A. when

interviewed by S. J. Woolf, Chairman of the National Labor Board, said:

> "The strike as a first resort is not prohibited by law; it is banned by common sense. * * *
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> "A great deal of confusion has been caused by those who say that workmen have been denied this right or who say that the strike has been outlawed. The strike is no more illegal than action of an employer in closing down his plant. Either may be justified. *But neither should be resorted to without the seeking first of other means toward the amicable settlement of disputes.*" *New York Times, November* 12, 1933, Sec. VI, p. 6.

And on the floor of the Senate on April 23, 1947, Senator Taft said:

> "Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on free collective bargaining. * * *
>
> "So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions *after proper opportunity for mediation.*" *Cong. Record*, 80th Cong., 1st Sess., p. 3951.

In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), this Court said (p. 42):

> "Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. *Refusal to confer and negotiate has been one of the most prolific causes of strife.* This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances." (Emphasis supplied.)

In keeping with these pronouncements and for the reasons set forth at length in Part III of this Argument, *infra*, the courts and the Board as well have not granted immunity from discharge to employees who engage in walkouts without notice and without stating the purposes or objectives of such, whether or not there is a current labor dispute.[61]

Petitioner's argument (Brief, pp. 14-15) that Section 7 protects all concerted activity unless it is either "unlawful" or "plainly indefensible by all accepted standards of conduct", is not borne out by the decided cases.[62] To the contrary, the Act contains no such language and imposes no such standards; and the House Conference Report No. 510, 80th Cong., 1st Sess., pp. 39, 59, by using such words as "undesirable concerted activities" and "improper conduct",

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[61] *Automobile Workers v. National Labor Relations Board*, 336 U.S. 245 (1949); *National Labor Relations Board v. Ford Radio & Mica Corp.*, 258 F. 2d 457 (2nd Cir. 1958) *National Labor Relations Board v. Massey Gin & Machine Works, Inc.*, 173 F. 2d 758 (5th Cir. 1949), *cert. denied*, 338 U.S. 910 (denying enforcement to 78 NLRB 189 (1948)); *National Labor Relations Board v. Insurance Agents' International Union*, 361 U.S. 477, 483, n. 6 (1960) (dictum); *Textile Workers Union of America v. National Labor Relations Board*, 227 F. 2d 409, 410 (D.C. Cir. 1955) (dictum), *cert. vacated*, 352 U.S. 864; *Personal Products Corporation*, 108 NLRB 743 (1954); *Valley City Furniture Company*, 110 NLRB 1589 (1954); *Pacific Telephone and Telegraph Company*, 107 NLRB 1547 (1954); *Honolulu Rapid Transit Co., Ltd.*, 110 NLRB 1806 (1954).

[62] See cases cited in footnotes 58, 60 and 61, *supra*. See also *National Labor Relations Board v. International Brotherhood of Electrical Workers*, 346 U.S. 464 (1953); *National Labor Relations Board v. Rockaway News Supply Co., Inc.*, 345 U.S. 71 (1953); *National Labor Relations Board v. Jamestown Veneer & Plywood Corp.*, 194 F. 2d 192 (2nd Cir. 1952). See also, Gregory, *Unprotected Activity and the NLRA*, 39 Va. L. Rev. 421 (1953); Cox, *The Right to Engage in Concerted Activities*, 26 Ind. L.J. 319 (1951); Kelsey, *Partial Strikes*, 6 N.Y.U. Ann. Lab. Conf. 281 (1953); Mittenthal, *Partial Strikes and National Labor Policy*, 54 Mich. L. Rev. 71 (1955); Green, *Employer Responses to Partial Strikes: A Dilemma?*, 39 Tex. L. Rev. 198 (1960).

indicates an intention to deny statutory protection to employees where their conduct, although perfectly lawful, is inconsistent with and not sanctioned by the fundamental purposes and policies of the Act.

9.

Economic Strikers Are Not Immune From Discharge

In *Dorchy v. Kansas*, 272 U.S. 306, 311 (1926), Mr. Justice Brandeis said, "Neither the common law, nor the Fourteenth Amendment confers the absolute right to strike." The same can be said for the National Labor Relations Act An economic strike to better working conditions remains only a partial right. It is protected from destruction by injunction by the Norris-LaGuardia Act. It is protected from destruction by way of discharge or other discrimination by the National Labor Relations Act only in those specific instances where the discharge or discrimination interferes with efforts towards self-organization and collective bargaining.

Neither Section 7 nor Section 13 precludes the employer from taking action of his own for reasons not condemned by the Act. He can discharge for cause. *National Labor Relations Board v. International Brotherhood of Electrical Workers*, 346 U.S. 464 (1953); *National Labor Relations Board v. Insurance Agents' International Union*, 361 U.S. 477, 483 (1960) (dictum). He can lock out employees in economic retaliation. *National Labor Relations Board v. Truck Drivers Local Union No. 449*, 353 U.S. 87 (1957). He can effectively discharge or lock out striking employees by hiring replacements to take over their jobs. *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *National Labor Board v. Sands Manufacturing Co.*, 306 U.S. 332 (1939).

Thus the right to strike, when exercised, is still accompanied by the same economic risk — discharge — which was present before the Act. Drinker, *The Right to Discharge for "Union Activity"*, 88 U. of Pa. L. Rev. 806 (1940). The limits of its protection are spelled out by Sections 7 and 8(a)(1) of the Act, as amended. In ascertaining these limits, guidance is to be had in both the rules of interpretation and procedural limitations found in Sections 1, 2(3), 2(9), 10(c) and 13. A review of the public policy underlying these statutory provisions affords the proper synthesis.

III.

The Synthesis — Public Policy

To strike a proper balance of the conflicting legitimate rights of employees and employers, we must strive to clearly ascertain our national labor policy. This public policy has received considerable statutory expression[62] in

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[62] A succinct yet complete expression by this Court of the underlying policy of the Act and of the fundamental rights being protected by it appears in *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 182-83 (1941):

"Congress explicitly disclosed its purposes in declaring the policy which underlies the Act. Its ultimate concern, as well as the source of its power, was 'to eliminate the causes of certain substantial obstructions to the free flow of commerce.' This vital national purpose was to be accomplished 'by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association.' § 1. Only thus could workers ensure themselves economic standards consonant with national well-being. Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise. 'The Act', this Court has said, 'does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them.' But 'under cover of that right,' the employer may not 'intimidate or coerce its employees with respect to their self-organization and representation.' When 'employers freely recognize the right of their employees to their own organizations and their unrestricted right of representation there will be much less occasion for contro-

the Wagner Act and in the Taft-Hartley Amendments to the Act. See 29 U.S.C. §§ 141(b), 151, 171(a), Appendix A, *infra*, pp. 72-73, 75-76.

The first paragraph of Section 1 of the Act, as amended, finds that the refusal by some employers to permit and recognize the right of employees to act collectively is a major cause of strikes which in turn obstruct commerce in four specified ways.

The second paragraph of Section 1 reiterates the same thought, omitting "strike" as the immediate cause of the burden to commerce and attributing this directly to inequality of bargaining power between employees and employer.

The third paragraph states that the flow of commerce will be promoted and sources of industrial strife [strikes] will be removed by protecting the right of employees to organize and bargain collectively, "by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions", and by restoring equality of bargaining power.

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versy in respect to the free and appropriate exercise of the right of selection and discharge.' *Labor Board v. Jones & Laughlin*, 301 U.S. 1, 45, 46. This is so because of the nature of modern industrialism. Labor unions were organized 'out of the necessities of the situation . . . . Union was essential to give laborers opportunity to deal on equality with their employer.' Such was the view, on behalf of the Court, of Chief Justice Taft, *American Steel Foundries v. Tri-City Council*, 257 U.S. 184, 209, after his unique practical experience with the causes of industrial unrest as co-chairman of the National War Labor Board. And the present Act, codifying this long history, leaves the adjustment of industrial relations to the free play of economic forces but seeks to assure that the play of those forces be truly free." See also, Sen. Rep. No. 573, 74th Cong., 1st Sess., pp. 1-5; H. R. Rep. No. 1147, 74th Cong., 1st Sess., pp. 8-9.

The fourth paragraph, added by Taft-Hartley, states that certain practices by some labor organizations also burden and obstruct commerce "through strikes and other forms of industrial unrest or through concerted activities."

Finally, the fifth paragraph of Section 1 states the policy of the United States is to eliminate and mitigate these obstructions and their causes by encouraging "the practice and procedure of collective bargaining" and by protecting the right of the employees to organize as they choose, "for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

The purpose of the Act is manifestly to encourage and promote collective bargaining by restoring and maintaining equality of bargaining power and thereby eliminate industrial unrest and strife, i.e., strikes. This is done primarily by imposing a duty upon the employer to recognize the employee's right to organize and bargain collectively through representatives of their own choosing.

There is no intimation whatever of a purpose to support or encourage employees, whose employer is in good faith ready to negotiate over working conditions, to take the law into their own hands and resort to "strikes and other forms of industrial strife," which paragraph one of Section 1 specifically designates as the burden upon commerce sought to be prevented.

In the context of these declared findings and policy, we must construe Section 7 and 8(a)(1), deriving assistance from Section 2, defining the terms "employee" and "labor dispute", Section 13, preserving the "right to strike", and Section 10(c), giving the Board power to reinstate "employees" with or without back pay in order to "effectuate the policies of this Act" while at the same time denying the Board power to reinstate employees discharged "for cause."

1.

Section 7 of the Act

Section 7 gives five rights, the fifth one being added by Taft-Hartley, viz.: (1) to self-organization, (2) to form, join or assist labor organizations, (3) to bargain collectively through representatives of their own choosing, (4) to engage in other concerted activities "for the purpose of collective bargaining or other mutual aid or protection," and (5) the right to refrain from any such activities.

Clearly the first four rights are not given for all purposes but solely for the purpose of "collective bargaining or other mutual aid or protection." Nowhere is the right to strike spelled out although obviously it could have been. Under Section 7, employees can only claim the right to engage in (1) constructive concerted activities directed towards negotiation and bargaining over working conditions, or (2) defensive activities such as a defensive strike to protect themselves from unfair labor practices of an employer.

That Section 7 does not protect an unannounced economic strike without stated purpose or objective, but only constructive concerted activity by way of negotiation or collective bargaining, is fully confirmed not only by the policy expressed in Section 1 of the Act but by the use of the word "other" in Section 7. "Other" refers back to "collective bargaining." By familiar principles of statutory construction "other" limits what follows to activities of the same nature as collective bargaining. Collective bargaining is essentially a constructive, peaceful activity, and industrial peace is the purpose of the Act.

Compare the phrase in the fourth paragraph of Section 1 where strikes "or" concerted activities are mentioned in the disjunctive. Section 7, too, could have referred to "strikes or concerted activities" but it did not do so.

Compare further the phrase in paragraph five of Section 1, where it is said that the policy of the United States is to encourage "the practice and procedure of collective bargaining" and to protect the right of the workers to organize "for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." Here the word "other" refers back to "negotiating" and here again the right to mutual aid or protection being recognized is the right to engage in constructive negotiation and collective bargaining not strikes.

We recognize that a potential economic strike is "a conventional factor in the collective-bargaining process,"[64] but such a strike is protected by Sections 2(3), 10(c) and 13, not by Section 7.

It should be noted once again that the LaFollette amendment to Public Resolution No. 44 referred both to the right to strike *or* to engage in other concerted activities. The Wagner Act carried over into Section 13 only that language referring to the right to strike, protecting other concerted activities by Sections 7 and 8(1). If Congress really had intended Section 7 to include and protect the right to strike, it would not have enacted Section 13, for the language of Section 13 would have been wholly superfluous.

2.

Sections 2(3) and 2(9) of the Act

Turning to Sections 2(3) and 2(9), the obvious primary purpose of Congress is to provide by these definitions that workers should not lose the right to organize and to bargain collectively as recognized by the Act *merely* because they

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[64] *National Labor Relations Board v. Lion Oil Co.*, 352 U.S. 282, 298 (1957) (Frankfurter, J., concurring in part and dissenting in part.)

have temporarily stopped work either by reason of a current labor dispute or as a defense against an unfair labor practice.[65] In conjunction with Section 10(c), these definitions protect the employees' right to be reinstated with or without back pay if the Board finds they have been the victims of an unfair labor practice and that such reinstatement is necessary to protect their right to self-organization and collective bargaining. These definitions likewise preserve the reinstatement rights of employees engaged in an economic strike, but only if it is engaged in "as a consequence of, or in connection with, any current labor dispute." It is noteworthy, also, that while Section 2(3) preserves reinstatement rights of economic strikers, it does not guarantee them in all events.

Given an economic strike in the course of a current labor dispute, Section 2(3) does not render the employer powerless to sever the employee-employer relationship by discharge for cause. If Section 2(3) is construed to mean

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[65] Sen. Rep. No. 573, 74th Cong., 1st Sess., pp. 6-7, provides:
"The term 'employee' also includes any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair labor practice, who has not attained any other regular or substantially equivalent employment. The bill thus observes the principle that men do not lose their right only to be considered as employees for the purposes of this bill *merely* by collectively refraining from work during the course of a labor controversy. Recognition that strikers may retain their status as employees has frequently occurred in judicial decisions. (See, for example, *Michaelson v. United States* (291 Fed. 940), reversed on other grounds in 266 U.S. 42.) To hold otherwise for the purposes of this bill would be to withdraw the Government from the field *at the very point where the process of collective bargaining has reached a critical stage and where the general public interest has mounted to its highest point.* And to hold that a worker who because of an unfair labor practice has been discharged or locked out or gone on strike is no longer an employee, would be to give legal sanction to an illegal act and to deny redress to the individual injured thereby." (Emphasis supplied)

that the employee relationship must be held in *status quo* without regard to any event separable from the mere act of ceasing to work, "the right of the employer to select and discharge his employees (*National Labor Relations Board v. Jones & Laughlin Steel Corporation, supra*), which still exists in absence of intimidation or coercion in violation of statute, would be cut off." *National Labor Relations Board v. Sands Mfg. Co.*, 96 F. 2d 721, 726 (6th Cir. 1938), *affirmed*, 306 U.S. 332 (1939). Where the "cause" is separable from the concerted activity, Section 2(3) does not avail and it matters not that the occurrence was connected with a current labor dispute. *National Labor Relations Board v. International Brotherhood of Electrical Workers*, 346 U.S. 464, 476-78 (1953).

3.

The Act Does not Distinguish Between Discharge and Replacement. An Employer May Either Discharge or Replace Striking Employees If Its Motives are Lawful and Proper.

Manifestly, if the Act was intended to preclude the employer from interfering with an economic strike in any way, the most obvious right to take away from the employer would be the right to hire replacements. This, of course, would place the employer wholly at the mercy of the strikers, and workers naturally would use the strike weapon more and more to gain their ends. The resultant increase of strikes would increase burdens on commerce not diminish them. No such unbalanced positioning of economic power was ever intended by the Act. Early in the history of the Act, the employer's right to hire replacements for strikers was expressly affirmed. *National Labor Relations Board v. Mackay Radio and Telegraph Co.*, 304 U.S. 333 (1938). And in recent years, the employer's right to

discharge strikers for valid reasons even prior to hiring replacements has finally been sustained.

Many decisions relying on the *Mackay* case erroneously drew a distinction between replacement of striking employees and an outright discharge of striking employees prior to their unconditional offer to return to work.[66] But this Court has never drawn any such distinction. In the *Mackay* case, the Board took three different positions. It first charged the employer with discrimination in discharging the five men. Later, it withdrew this charge and asserted that the discrimination was the refusal to re-employ the five men. Finally, it reverted to the position that it was not a failure to employ but a wrongful discharge which violated the Act. This Court waived aside such highly technical positions, saying (304 U.S. at 349):

> "All parties to the proceeding knew from the outset that the thing complained of was discrimination against certain men by reason of their alleged union activities. If there was a current labor dispute the men were still employees by virtue of § 2(3), and *the refusal to let them work was a discharge.*" (Emphasis supplied.)

In *National Labor Relations Board v. Sands Mfg. Co.*, 306 U.S. 332 (1939), this Court implied that the employer was at liberty either to replace or discharge men who refused to work in breach of their contract, saying (p. 344):

> "It was at liberty to treat them as having severed their relations with the company because of their breach and to consummate their separation from the company's employ by hiring others to take their places. The Act does not prohibit an effective *discharge* for repudiation by the employe of his agreement, any

[66] See *e.g., National Labor Relations Board v. United States Cold Storage Corp.*, 203 F. 2d 924, 927 (5th Cir. 1953), *cert. denied*, 346 U.S. 818; *National Labor Relations Board v. Globe Wireless Limited*, 193 F. 2d 748, 750 (9th Cir. 1951) (and cases there cited).

more than it prohibits such *discharge* for a tort committed against the employer." (Emphasis supplied.)

As in the *Sands* case, in *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), this Court said nothing to warrant drawing a distinction between discharge and replacement of strikers. If Congress meant to continue an employee status, despite discharge for cause, by virtue of the definition in Section 2(3), this Court hinted that such a statute would be unconstitutional. But this Court avoided the constitutional question by finding complete absence of legislative intention, saying (p. 255):

> "We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct, — to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work."

In a concurring opinion, Mr. Justice Stone noted that Senate Committee Report No. 573, 74th Cong., 1st Sess., referred to Section 2(3) as observing the principle that men do not lose their employee status "*merely* by collectively refraining from work during the course of labor controversy." Mr. Justice Stone said (306 U.S. at 264-65) that it does not follow that the language of Section 2(3)—

> "is to be read as depriving the employer of his right, which the statute does not purport to withdraw, to terminate the employer-employee relationship for reasons dissociated with the stoppage of work because of unfair labor practices. * * * I cannot attribute to Congress in the adoption of § 2(3), explained as it was in the Senate Committee Report, a purpose to cut off the right of an employer to discharge employees who have destroyed his factory and to refuse to reëmploy them, if that is the real reason for his action."

The question was directly considered in *National Labor Relations Board v. Rockaway News Supply Co., Inc.*, 197 F. 2d 111, 115 (2nd Cir. 1952), *affirmed*, 345 U.S. 71 (1953). The Second Circuit had said that the Board was being "wholly unrealistic" in the distinction which it sought to make between the discharge of the employee and the suggested replacement of him as a striker. This Court agreed, saying (p. 75):

> "The distinction between discharge and replacement in this context seems to us as unrealistic and unfounded in law as the Court of Appeals found it. This application of the distinction is not sanctioned by *Labor Board v. Mackay Co.*, 304 U.S. 333, 347. It is not based on any difference in effect upon the employee. And there is no finding that he was not replaced either by a new employee or by transfer of duties of some nonobjecting employee, as would appear necessary if the respondent were to maintain the operation. Substantive rights and duties in the field of labor-management do not depend on verbal ritual reminiscent of medieval real property law.
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> "In this case there is no finding, evidence or even charge that the dismissal of Waugh resulted from anti-union bias, or was intended to or did discriminate against him to discourage membership in a labor organization."

4.

Section 10(c) of the Act

The correctness of the above quoted dictum in *Rockaway News* is confirmed by reference to Section 10(c). The power of the Board to order reinstatement under Section 10(c) is dependent upon its finding that an unfair labor practice has been committed. Since by hypothesis an economic strike is not caused by and is not a consequence of an unfair labor practice, it becomes crucial to the reinstatement of an economic striker to inquire, not whether he was

discharged instead of replaced, but whether the discharge (or the replacement and refusal to rehire) was motivated by the employer's desire to interfere with employee's right to organize and bargain collectively. If the discharge was for cause, as spelled out in other language in Section 10(c), then there is no unfair labor practice, and hence the power to reinstate is completely lacking.

Section 10(c) also limits the reinstatement power by requiring a finding that reinstatement "will effectuate the policies of this Act." It may be asked, what policy will be effectuated by reinstatement of the employees in this case? What employee activity will be encouraged? What employer activity condemned by the Act will be discouraged. The Board made no findings which would serve to answer these questions. It should have done so. See *Phelps Dodge Corp. v. National Labor Relations Board,* 313 U.S. 177, 197 (1941). It is submitted that the syllogistic findings of an economic strike and a discharge do not automatically confer power to order reinstatement. Reinstatement of the employees in this case can only encourage irresponsible unilateral strike action which the Act seeks not to encourage but to prevent. Reinstatement cannot possibly encourage negotiation and collective bargaining in the interests of industrial peace which the Act seeks to promote. It can only discourage legitimate employer concern with the maintenance of order and discipline among its employees, a concern which is essential to the continued productive operation of its business and with which the Act does not pretend to interfere.

CONCLUSION

In his book, THE RAINBOW (1936), Donald R. Richberg said (pp. 62-63, 69):

> "We said: 'The purposes and policies of the Recovery Administration are not directed toward aiding either

side in a civil war to achieve another costly and temporary victory. We are not fighting the battles of capital or labor. We are seeking not only to build up a machinery of cooperation, but to do that which may be more important and lasting: We are seeking to create self-interest in cooperation, to demonstrate to employers and employees alike that they have more to gain in common counsel and united action than in contests of brute strength and economic power'."

* * * * * * *

"* * * Yet the process of eliminating the causes of such conflicts involves an assertion of the supremacy of the public interest which can only be maintained through substituting for many exercises of individual liberty legal obligations to serve the general welfare. To impose such obligations and yet retain individual liberty and the freedom of private enterprise requires us to answer a very difficult question: Where shall we draw the line between necessary social discipline and offensive regimentation?

"There is one definite clue that we can follow in seeking to answer this puzzling question. We can set ourselves firmly against the establishment of an unbalanced, irresponsible authority in any social class, or in the government itself."

For all the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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March 30, 1962.

APPENDIX A

STATUTES INVOLVED

Section 2 of the Norris-LaGuardia Anti-Injunction Act (47 Stat. 70, 29 U.S.C. §102) is as follows:

> Section 2. Public policy in labor matters declared.
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> * * * * * * *
>
> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership associations, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

Section 7(a) of the National Industrial Recovery Act (48 Stat. 195, 15 U.S.C. §707(a)) is as follows:

> Section 7. (a) Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or

in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.

The pertinent provisions of the National Labor Relations Act, as amended, (49 Stat. 449, 61 Stat. 136, 29 U.S.C. §151, *et seq.*) are as follows:

Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 2. When used in this Act—

* * * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection

with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * * *

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * *

Section 10. (c) * * *.

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

* * * * * * *

Section 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

The pertinent provisions of the Labor Management Relations Act (61 Stat. 136, 29 U.S.C. § 141, *et seq.*) are as follows:

Section 1. (b) * * *.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to

protect the rights of the public in connection with labor disputes affecting commerce (29 U.S.C. §141(b)).

Section 201. That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees (29 U.S.C. §171(a)).

* * * * * *

Section 501. When used in this Act—

* * * * * *

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees (29 U.S.C. §142(2)).

* * * * * *

Section 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent * * *; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act (29 U.S.C. §143).

APPENDIX B

Definitions of the Term "Strike"

Webster's, *New International Dictionary* (Second Edition 1959):

"*Strike.* * * * 7. Act of quitting work; specif., such an act done by mutual understanding by a body of

workmen as a means of enforcing compliance with demands made on their employer; a stopping of work by workmen in order to obtain or resist a change in conditions of employment."

Funk & Wagnall's *New Standard Dictionary of the English Language* (1959 Edition):

"*Strike.* * * * 12. To quit or cease, as work, in order to compel compliance with a demand, redress a grievance, etc."

The Oxford English Dictionary (1933 Edition):

"*Strike.* * * * 9. A concerted cessation of work on the part of a body of workers, for the purpose of obtaining some concession from the employer or employers."

Stroud's *Judicial Dictionary* (Third Edition 1953):

"*Strike.* (1) 'There is no authority which gives a legal definition of the word "strike"; but I conceive the word means a refusal by the whole body of workmen to work for their employers, in consequence of either a refusal by the employers of the workmen's demand for an increase of wages, or of a refusal by the workmen to accept a diminution of wages when proposed by their employers' (per Kelly, C.B., *King v. Parker*, 34 L.T. 899), or, *semble*, such a refusal in consequence of any dispute between masters and men relating to the employment; in short, 'a "strike" is properly defined as a simultaneous cessation of work on the part of the workmen' (per Hannen, J., *Farrer v. Close*, L.R. 4 Q.B. 612.)"

Black's *Law Dictionary* (Fourth Edition 1951):

"*Strike.* The act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused."

The Restatement of *Torts*, §797, comment a:

> "*a. Definition of strike.* A strike is a concerted refusal by employees to do any work for their employer, or to work at their customary rate of speed, until the object of the strike is attained, that is, until the employer grants the concession demanded. * * * [*I*]*t is not a strike if employees temporarily stop work without making a demand upon the employer or using the stoppage as a means of exacting a concession from him, even if the stoppage is against his will.*" (Emphasis supplied).

Teller, *Labor Disputes and Collective Bargaining* (1940), Section 78:

> "The word 'strike' in its broad significance has reference to a dispute between an employer and his workers, in the course of which there is a concerted suspension of employment. * * *
>
> "The outstanding characteristics of the strike as that term is employed in modern times are four: first * * *,
>
> * * * * * *
>
> "Third, the existence of a dispute between the parties and the utilization by labor of the weapon of concerted refusal to continue to work, as the method of persuading or coercing compliance with the workingmen's demands."

Jeffery-DeWitt Insulator Co. v. National Labor Relations Board, 91 F. 2d 134, 138 (4th Cir. 1937), *cert. denied*, 302 U.S. 731:

> "A 'strike', in such common acceptation, is the act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some *demand* they have made upon him, and which he has *refused*." (Emphasis supplied.)

National Labor Relations Board v. Illinois Bell Tele- 342 U.S. 885; and *C. G. Conn, Limited v. National Labor Relations Board*, 108 F. 2d 390, 397 (7th Cir. 1939):

"The term 'strike' is applied commonly to a combined effort on the part of a body of workmen employed by the same master to enforce a *demand* for higher wages, shorter hours, or some other concession, by stopping work in a body at a prearranged time, and refusing to resume work until the demanded concession shall have been granted." (Emphasis supplied.)

Sandoval v. Industrial Commission, 110 Colo. 108, 130 P. 2d 930 (1942):

"A strike possesses at least four ingredients other than the suspended employer-employee relationship which has been mentioned, namely: (1) a *demand* for some concession, generally for a modification of conditions of labor or rates of pay; (2) a refusal to work, with intent to bring about compliance with the demand; (3) an intention to return to work when compliance is accomplished * * *" (Emphasis supplied.)